

# International M&A and Joint Ventures

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## I. Introduction

The 2008 international merger and acquisition/joint venture (M&A/JV) markets can be described in two words: “credit crunch.” After years of continual growth, 2008 has been a completely new experience for many companies and lawyers operating in the M&A markets. The number of deals decreased dramatically, and those that do take place often concern companies in financial distress. The M&A markets face a lack of financing. Leveraged buyouts (LBOs), at least on a larger scale, have more or less disappeared for the moment. Equity funds have come under pressure and have lost some ground to the industrial buyers.

The financial sector has been the sector hardest hit by the prevailing market conditions, and almost all governments in the world (including major European countries and the United States) have been forced to intervene in the markets with major rescue packages.

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But deals continue to happen, and 2008 saw several material international legal developments as described in further detail in the following reports from twenty-three different countries.

## II. Argentina<sup>3</sup>

During 2008, the market of M&A in Argentina showed two well defined but contrasting phases. This change in the trend is similar to the changes undergone by most countries as a result of the global financial crisis that worsened by mid-year. Argentina has not remained untouched by the collapse of the markets, even though the Argentine government has had no access to the international credit markets since the sovereign default of 2002. Globalization has immediately transmitted the change of trend and of the expectations in the world of business to this country.

### A. THE FIRST PHASE

The year 2008 started with a positive impulse from the previous year, which witnessed transactions for U.S. \$13,539 million. This first stage was marked by the high price of the commodities, which exerted a strong attraction on the exporting industries. Food (especially meat processing and dairy) industries, beverage industries, farming, and mining were the busiest sectors. But realty, car parts, chemicals, and several manufacturing industries were also active.

Another sign of this phase was the active participation of local investors. Because local investors know the rules of the game, they are the ones who dare invest in such a highly regulated market as Argentina. Among the most important international investors were Brazil, the United States, and Italy. Brazilian investments, for example, have totaled over eight trillion U.S. dollars since 2002. This includes acquiring a controlling interest in new companies as well as new capital investments.

The Argentine market typically features numerous transactions of low-value (between U.S. \$1 million and U.S. \$50 million) and middle value (between U.S. \$50 and U.S. \$500 million). For this reason, all measurements, comparison measures, and ratios will vary when only one large transaction takes place.

### B. THE SECOND PHASE

The effects of the financial crisis caused an abrupt change in the M&A market trend. The uncertainty expanded in view of the continuous fall of the stock markets. This situation was worsened by a series of government policies that were a necessary consequence of the crisis meant to lessen its effects, but instead caused the opposite and increased the negative trend of the local market.

Most of the scheduled transactions were cancelled, even those at advanced stages. Scarce international credit made financing difficult, and the collapse of the market value of "target companies" hampered the assessment of their values and constituted an obstacle to using their assets as security.

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3. This section was authored by Saúl Ricardo Feilbogen, Vitale, Manoff & Feilbogen, Buenos Aires, Argentina.

In this climate, the Government increased its participation in the local economy. It is not easy to predict whether this involvement will be only temporary or whether it will increase. The intervention of the Government in Aerolíneas Argentinas (the airline owned by the Spanish group Marsans) provides a good example of this situation. Initially presented as a purchase by the Argentine State, the parties have hotly argued about the company's value. The enormous debt burden of Aerolíneas was the decisive element in the assessment carried out by the Government, in contrast to the method of future cash flows applied by the seller. The Argentine Congress is debating a possible expropriation of the airline, while the Argentine State keeps paying for its operational costs.

Another example is the decision to nationalize the private pension fund system that has been in force for fourteen years. If the nationalization is approved, the stock participation that the companies managing the pension funds (the so-called AFJP) have in many local companies will go solely to the hands of the Argentine State.

We may well say that with just one move, a "transaction" for U.S. \$4,000 million will be concluded. This figure is the total amount invested by the AFJP in the thirty-nine Argentine private companies that will go to the Argentine Government. With such an amount, the number and the volume of transactions performed during the year 2008 will certainly increase, although this is hardly a standard market acquisition. As a result of this "transaction," the Argentine State will obtain a participation in such different industries and sectors as banking (Macro: 24.21%, Galicia: 13.96%, Frances: 5.71%), energy (Pampa Energía 15.95%, Edenor 23.09%, Transener: 18.15%), steel (Tenaris: 2.41%, Siderar: 22.70%), telecommunications (Telecom: 15.44%), and hydrocarbon (Petrobrás: 8.60%, Transportadora gas del Sur: 19.96%).

Because of the considerable drop in the stock prices, many local companies have made public offers to buy back their stock. The companies have declared that they are trying to protect the value of their stock, but they are also attempting to show the market signs of their strength. To facilitate this mechanism, the Comisión Nacional de Valores, (the federal stock commission that regulates and supervises the capital market) by Resolution 535/2008 suspended the ten percent limitation to which public companies were subject for buying their own stock back until next December. This resolution acknowledges that this mechanism helps avoid serious damage, since the present prices do not reflect the actual value of the issuing companies. The regulation is consistent with the principle established by Section 220, subsection 2 of the Argentine Law of Business Organizations No 19.550, which provides for exceptional authorizations to companies to buy their own shares back with yearly net profits.

The companies that have launched such public offers are Banco Macro, whose shares dropped by 58.20%, Banco Patagonia, with a drop of 69.07%, Molinos Río de la Plata, which lost 16.59%, Cresud whose stock fell by 64%, and Pampa Energía, which also lost 67.28%. These variations are taken from the beginning of 2008.

The trend of the second part of 2008 will continue for at least the first semester of 2009. There are high probabilities that we witness a process of concentration in some sectors of the economy because of the crisis and the attractive opportunities the market will offer. The sectors that will still be attractive will be the exports sectors, preeminently to local and regional investors.

### III. Australia<sup>4</sup>

In face of the global financial crisis, the Australian M&A market slowed in 2008. For the first nine months of 2008, M&A activity in Australia reached U.S. \$108.7 billion, representing a 24.5% decrease in activity compared with the first nine months of 2007.<sup>5</sup> The financials, materials, and energy sectors each contributed about twenty-two percent to Australia's M&A activity.<sup>6</sup>

The global financial crisis has led to the collapse of a number of prominent Australian publicly listed companies including Allco Financial Group and ABC Learning, while several others rest on the brink of failure.

#### A. MAJOR TRANSACTIONS

The key announced transactions for the first nine months of 2008 include:

- (a) Westpac Banking Corporation's A\$67 billion proposed merger with St. George Bank, which will result in Westpac becoming Australia's largest bank;
- (b) Zinifex Limited's A\$12 billion merger with Oxiana Limited;
- (c) ConocoPhillips Company's A\$9.6 billion 'Coal Seam Gas' joint venture with Origin Energy Limited;
- (d) Incitec Pivot Limited's A\$3.3 billion acquisition of Dyno Nobel Limited; and
- (e) Commonwealth Bank of Australia's A\$2.1 billion acquisition of the unlisted Bank of Western Australia Limited.

#### B. TAKEOVERS PANEL

The Takeovers Panel (Panel) is an administrative body that acts as the main forum for resolving disputes about a takeover bid until the bid period has ended. Back in 2006, there was a major setback for the operation of the Panel with considerable doubt raised about its jurisdiction to conduct reviews of takeovers on constitutional grounds. Consequently, the Panel was not accepting applications from parties seeking remedies based on contraventions of the Corporations Act 2001 (Cth). In February 2008, the High Court of Australia confirmed that the Panel was constitutionally valid. The Panel's role as the main forum for resolving disputes about takeover bids has been reaffirmed.

In April 2008, the Panel increased the requirements for the disclosure of equity derivatives where a control transaction exists. A control transaction is a transaction that affects (or is likely to affect) control (or potential control) of a company or the acquisition (or proposed acquisition) of a substantial interest in a company. This position was taken by the Panel in response to its concerns that bidders were using undisclosed equity derivatives to influence the conduct of control transactions. The Panel now requires all long

4. This section was written by Zeke Solomon (Partner), Andrew Finch (Partner), Tim Cardiff (Lawyer), Allens Arthur Robinson Lawyers.

5. Thomson Reuters, *Mergers and Acquisitions Legal Advisers Review*, Third Quarter 2008, available at [http://www.thomsonreuters.com/content/PDF/financial/league\\_tables/ma/2008/3Q08\\_ma\\_fin\\_adv.pdf](http://www.thomsonreuters.com/content/PDF/financial/league_tables/ma/2008/3Q08_ma_fin_adv.pdf).

6. *Id.*

positions of 5 percent or greater—and any short equity derivative positions that affect such long positions—in a target company to be disclosed.

In June 2008, the Panel published its final position on the giving of collateral benefits in the context of control transactions.

One of the key principles of Australian takeovers regulation is that the holders of a class of securities all have a reasonable and equal opportunity to participate in any benefits accruing to the holders of securities in that class through any proposal under which a person would acquire a substantial interest in the target company. The Corporations Act 2001 (Cth) prohibits a bidder from giving a holder of securities a benefit that is not offered to all holders of securities in the same class under the takeover bid if the benefit is likely to induce the holder to accept the offer or dispose of the securities. This is known as a collateral benefit. The factors that the Panel will take into consideration when determining whether a collateral benefit gives rise to “unacceptable circumstances” include:

- i. whether it was offered, given or received when a control transaction was contemplated[;]
- ii. whether it will be given or received irrespective of the control transaction outcome;
- iii. whether it and the control transaction are linked, for example, through bid conditions or an understanding[;]
- iv. whether there is a pre-existing relationship or a series of independent transactions explaining it and
- v. whether security holders have approved the benefit.<sup>7</sup>

### C. ACCC'S DRAFT MERGER GUIDELINES

The Australian Competition and Consumer Commission (the ACCC) is responsible for enforcing the competition requirements of the Trade Practices Act 1974 (Cth) (the TPA) in relation to proposed M&A transactions. In February 2008, the ACCC released for public comment the revised Draft Merger Guidelines (the Guidelines), which outlines the ACCC's framework for reviewing the competitive effects of M&A transactions in Australian markets. The Guidelines set out several proposed changes to the ACCC's current approach to reviewing M&A transactions. There is no longer reference to indicative market share concentration thresholds below which the ACCC is unlikely to intervene in a proposed merger transaction. In place of these market share safe harbors, the ACCC will now calculate market share by reference to x-firm concentration ratios and the Herfindahl-Hirschman Index, and will use market share statistics within the wider context of the whole circumstances of the proposed merger transaction.

Notifying the ACCC of proposed merger transactions is voluntary, and the Guidelines have introduced new thresholds above which the merger parties should notify the ACCC. Since many Australian industries are concentrated and the thresholds are open to a broad degree of interpretation, these new thresholds are not likely to reduce the number of merger clearance applications made to the ACCC.

7. Takeovers Panel, *Guidance Note 21: Collateral Benefits* 9 (Apr. 14, 2008) available at [http://www.takeovers.gov.au/content/Guidance\\_Notes/Current/downloads/GN21\\_2008.pdf](http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN21_2008.pdf).

The Guidelines provide that the ACCC will take a stricter approach to divestment undertakings and the ACCC will prefer that any required divestments occur on or before completion of the merger. The Guidelines also indicate that the ACCC will use internal company documents, such as board papers, as evidence to test the likely competitive impact of the proposed merger transaction.

#### D. FOREIGN INVESTMENT SCREENING PROCESS

In March 2008, the federal government released a set of six principles that are to be considered when it reviews applications by foreign governments to invest in Australian businesses or assets. The Federal Government's foreign investment policy requires all direct investments by foreign governments or investments through a company in which a foreign government owns at least a fifteen percent stake to be notified for prior Australian government approval. Additionally, investments by foreign governments in "sensitive sectors" are subject to heightened screening requirements. Sensitive sectors include residential real estate, banking, telecommunications, shipping, civil aviation, airports, and the media. The six principles are:

- i. An investor's operations are independent from the relevant foreign government;
- ii. An investor is subject to and adheres to the law and observes common standards of business behavior;
- iii. An investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned;
- iv. An investment may impact on Australian Government revenue or other policies;
- v. An investment may impact on Australia's national security; and
- vi. An investment may impact on the operations and directions of an Australian business and its contribution to the Australian economy and broader community.

The statement of these six principles gives transparency to the Federal Government's foreign investment policy position and highlights the important issues that should be addressed in applications by foreign governments and their agencies for approval to invest in Australian businesses or assets.

### IV. Austria<sup>8</sup>

#### A. WARRANTY EXCLUSION CLAUSES IN SHARE AND ASSET PURCHASE AGREEMENTS

On November 15, 2007, the Austrian Supreme Court held that the seller of a landfill was liable to the purchaser for the damage that resulted from an insufficient final capping of a landfill.<sup>9</sup> The asset purchase agreement contained a general warranty exclusion

8. This section was written by Paul Luiki, a partner at Fellner Wratzfeld & Partner Rechtsanwälte GmbH, and Maria Thierrichter, an associate at Fellner Wratzfeld & Partner Rechtsanwälte GmbH.

9. Oberster Gerichtshof [OGH] [Supreme Court] (Austria) Nov. 15, 2007, 2 Ob 209/07k, *available at* [http://www.ris.bka.gv.at/Dokument.wxe?QueryID=AbfrageJustiz&Dokumentnummer=JJT\\_20071115\\_OGH0002\\_0020OB00209\\_07K0000\\_000&ResultFunctionToken=1a53d6fc\\_cfbc\\_4ff5\\_b82e\\_e4336a16aF42&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&SucheNachRechtssatz=True&SucheNachText=True&GZ=Z+Ob+209%2F07k+VonDatum=22.04.2009&Norm=&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=](http://www.ris.bka.gv.at/Dokument.wxe?QueryID=AbfrageJustiz&Dokumentnummer=JJT_20071115_OGH0002_0020OB00209_07K0000_000&ResultFunctionToken=1a53d6fc_cfbc_4ff5_b82e_e4336a16aF42&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&SucheNachRechtssatz=True&SucheNachText=True&GZ=Z+Ob+209%2F07k+VonDatum=22.04.2009&Norm=&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=).

clause, emphasizing that the assets were transferred in their present condition and that no warranty was given for the fulfillment of conditions in administrative orders issued by authorities. The court, however, held that the contractual exclusion of warranties did not extend to that the seller fraudulently kept secret from the purchaser and that warranty exclusion clauses are generally to be interpreted restrictively.

The seller had previously provided false information to the administrative authority on conforming the landfill's cap to environmental provisions. Furthermore, the seller sealed and covered the landfill with a far too thin cap, which gave the impression of the landfill being correctly sealed. Therefore, the court held that due to the seller's intentionally not disclosing the non-conformance of the landfill's cap, the warranty exclusion contained in the asset purchase agreement was not effective with regard to the resulting damage. Additionally, the court stated that the seller had conclusively warranted the conformance of the landfill's cap with the relevant administrative decree, because the asset purchase agreement contained a clause that the landfill would be operated by the purchaser, and that therefore, the warranty exclusion clause did not apply to this particular circumstance. This conclusion of the court demonstrates the importance of making sure that exclusion clauses are not in potential conflict with other clauses in the agreement. The agreement further obligated the purchaser to comply with relevant legal provisions in its future operation of the landfill. The court held that this implied that at the time of sale such compliance existed.

This decision has been criticized on the ground that it may lead to a more stringent obligation of the seller to inform the purchaser of deficiencies of the purchased object or company. Lawyers representing sellers will be increasingly challenged to make clear in the agreement that representations and warranties are not conclusive.

For M&A practice in Austria, this means that warranty exclusion clauses contained in asset or share purchase agreements will continue to be used as before, but with a slightly higher level of attention to be paid to precise wording and a more affirmative approach to disclose possible problems with the target company.

## B. RESTRICTIONS WITH REGARD TO SUPERVISORY BOARD MEMBERS

In a court ruling in March 2008 (decision 6 Ob 34/08f), the Austrian Supreme Court specified that employees of subsidiaries of a company may not act as supervisory board members of that company. This interpretation is not mirrored in the wording of the relevant paragraph of the Austrian Stock Corporation Act and was therefore disputed before this decision of the Austrian Supreme Court.

The rules with regard to membership restrictions in the supervisory board have gradually tightened. The most important restrictions are the following: persons who are (i) supervisory board members in more than ten corporations (being the chairperson of a supervisory board counts double), (ii) legal representatives of a subsidiary of the company, or (iii) legal representatives of a company, in which a member of the supervisory board is a managing director of the company, if they are not subsidiaries, may not be members of the supervisory board of the company. Even stricter provisions apply to members of supervisory boards in stock-listed companies. Further, section 90 (1) of the Austrian Stock Corporation Act provides that members of the supervisory board may not at the same time be

the managing directors or legal representatives of a company or its subsidiaries. They also may not be employees of the company.

The Austrian Supreme Court found that the term "company" in the second sentence of Section 90 (1) of the Austrian Stock Corporation Act needed to be interpreted widely to include subsidiaries of the company. This serves to avoid constellations that violate the natural organization structure of a group of companies: if the supervisory board member is at the same time an employee of the subsidiary, such member is in the awkward situation of having to supervise the management board, to which it is subordinated, as the management board of the parent company represents the shareholder of the subsidiary. Additionally, the supervisory board member would, in the course of its company group wide supervision task, also indirectly have to monitor itself. Therefore, the court held that if an employee of a subsidiary of a company is nevertheless appointed as a supervisory board member of the company, that appointment will be void.

When structuring M&A deals in Austria or establishing Austrian joint venture companies, the above-mentioned restrictions that apply to the selection of supervisory board members need to be taken into account since a violation of the latter will lead to the appointment being void and, if nevertheless registered, to the deregistration of the supervisory board member from the company register.

### C. ENTERPRISE CODE AMENDMENT ACT MAKES DUTIES OF AUDITORS CLEARER

The Enterprise Code Amendment Act<sup>10</sup> (Act) implements the E.U. directives on statutory audits of annual accounts and consolidated accounts (directives 2006/43/EC and 2006/46/EC). This Act strengthens the importance of internal control systems to help minimize financial, operational and compliance risks, enhance the quality of financial reporting, and provide wider competences for the audit committee. The Act imposes more stringent requirements on auditors, such as compliance with international accounting standards and internal rotation systems, plus cooling-off periods for key audit partners to ensure the independence of the auditor. Additionally, the Act provides that stock-listed companies must issue annual corporate governance declarations in which they declare which provisions of the corporate governance they do or do not comply with and explain their implementation of their rules. Whereas stock-listed companies have already been obliged to disclose transactions with related parties in their accounts, this requirement now has been extended to all corporations in so far as such transactions are of an unusual nature. In addition, the turnover figures contained in the definitions of small, middle-sized, and large companies have been increased to pay tribute to the principle of less and better regulation. The majority of the amendments entered into force on June 1, 2008; certain rules of the Act will apply to business years beginning after December 31, 2008.

With regard to the foundation of Austrian joint venture companies, the provisions of the Enterprise Code Amendment Act are particularly relevant for stock corporations, as an audit committee must be established and the duties with regard to an internal control system must be fulfilled. On a practical note, the annual accounts of corporations for

10. Unternehmensrechts-Änderungsgesetz 2008[URÄG] Enterprise Code Amendment Act] Bundesgesetzblatt Teil I [BGBl I] No. 2008/70 (Austria).



business years ending on December 31, 2007 or after must be submitted to the commercial register electronically.

#### D. MODERNIZATION OF PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

The Austrian legislative body plans to pass a law that will modernize its private equity and venture capital industry. A main private equity fund vehicle that has been used in the past—the SME financing corporation (*Mittelstandsfinanzierungsaktiengesellschaft*)—can no longer be used since it was found to violate E.U. state aid rules. In this respect, the Austrian legislature was forced to act.

The modernization aim is reflected in the title of the draft law, the “Capital Market Strengthening and Innovation Act 2008.” A stated goal of the draft law is to make it more attractive for private equity investors to invest in Austria. Austria historically lags behind most other developed countries in the percentage of private equity capital invested in Austria. For many observers, however, the draft law does not entirely meet the lofty modernization aim. While the new law indeed removes previous unwarranted restrictions (such as the private equity funds only being able to purchase up to forty-nine percent of the shares in a portfolio company), other restrictions have been put in place.

The law creates a new private equity vehicle, the so-called Investment Company (IC). The form of the vehicle itself is not new, as the IC must be either a stock corporation or a limited partnership under existing Austrian law. What is new is the requirement that the IC must have a minimum capitalization of EUR 2 million. In addition, more than fifty percent of an IC’s funds must be used for purchasing equity participations.

Debt financing thus is limited to just under fifty percent of the IC’s funds. A further restriction is that debt financing only can be provided to portfolio companies into which the IC previously has invested on the equity side.

There also are differentiations depending upon which specific legal form the IC takes. If the IC is a limited partnership, investors are limited to institutional investors that further must make a minimum investment of EUR 50,000. Private individuals thus cannot become investors in a private equity fund taking the form of an IC limited partnership. If the IC takes the form of a stock corporation, private individuals indeed can become investors. If, however, the minimum investment amount is under EUR 50,000, the IC must meet the prospectus requirements of the Capital Markets Act.

Due to the financial crisis, the effective date of the modernization law has been postponed to the latter part of 2009.

### V. Belgium<sup>11</sup>

#### A. REGULATORY & LEGISLATIVE DEVELOPMENTS

##### 1. *Abolishment of Bearer Securities*

January 1, 2008 was an important milestone in the abolition process of bearer securities. Belgium is one of the very few countries in the world that until recently still allowed the

11. This section was authored by Nicole Van Ranst and Nicolas Claerhout, Marx Van Ranst Vermeersch & Partners.

issuance of bearer securities. The Act of 14 December 2005 on the abolishing of bearer securities<sup>12</sup> gradually makes an end to the existence of bearer securities by means of milestones.

As of January 1, 2008, a company can no longer issue bearer securities. It may only issue registered securities or dematerialized securities. Furthermore, as of January 1, 2008, bearer shares that are kept in custody by a financial institution may no longer be delivered to the owners, but need to be converted as a rule of law into dematerialized securities.

## 2. *Transparency Requirements*

On September 1, 2008, the Act of May 2, 2007 on the publication of important participation in issuers whose shares are admitted to trading on a regulated market<sup>13</sup> became effective.<sup>14</sup> This act is an adoption into Belgian legislation of the Directive 2004/109/EC of December 15, 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.<sup>15</sup>

The act is applicable in the first instance to those entities with a registered office located on the territory of Belgium and that issue shares that are traded on a Belgian or foreign regulated market, and in the second instance to those entities that do not have a registered office located on the territory of Belgium but that issue shares that are traded on a Belgian regulated market.

In summary, the act installs two obligations: a duty of notification (towards the issuer of the shares and to the Bank Finance & Insurance Commission) to comply with by the natural person or legal entity that holds an important participation, and a duty of information to comply with by the issuer of the shares. The legal thresholds for notification are five percent of the votes attached to the issued shares. The issuer's by-laws may derogate from this figure, but the threshold may never be higher than five percent. Each time a subsequent threshold of five percent is passed, a notification has to be made within four days after the event causing the thresholds being exceeded. The issuer must inform the market of any notification that it received from a holder of an important participation. The issuer must also inform the market at the end of the month in which the capital of the issuer has changed, at the end of the month in which the number of shares has changed, or at the end of the month in which the number of votes attached to the issued shares has changed.

12. This Act was published in the Official Belgian Gazette on Dec. 23, 2005 *available at* [http://www.ejustice.just.fgov.be/mopdf/2005/12/23\\_1.pdf](http://www.ejustice.just.fgov.be/mopdf/2005/12/23_1.pdf).

13. This Act was published in the Official Belgian Gazette on June 12, 2007 *available at* [http://www.ejustice.just.fgov.be/mopdf/2007/06/12\\_1.pdf](http://www.ejustice.just.fgov.be/mopdf/2007/06/12_1.pdf).

14. The Royal Decree of February, 14 2008, which covers the publication of important participations was published in the Official Belgian Gazette on March 4, 2008 *available at* [http://www.ejustice.just.fgov.be/mopdf/2008/03/04\\_1.pdf](http://www.ejustice.just.fgov.be/mopdf/2008/03/04_1.pdf).

15. Council Directive 2004/109/EC, 2004 O.J. (390/38) (European Parliament and Council).

The issuer may comply with its duty of information through its corporate website. Examples of companies that already have done so in the months of September, October, and November 2008 are Inbev,<sup>16</sup> Agfa,<sup>17</sup> Barco,<sup>18</sup> Alfacam,<sup>19</sup> and Omega Pharma.<sup>20</sup>

### 3. *Cross-Border Mergers*

Just before the start of the parliamentary holidays in 2008, the Parliament approved the Act of 8 June 2008<sup>21</sup> covering, among other things, cross border mergers.

Starting June 26, 2008, a procedure for cross-border mergers, as laid down in Council Directive 2005/56/EC on cross border mergers of limited liability companies,<sup>22</sup> has been installed by means of an insertion of a new Title Vbis in Book XI of the Belgian Corporate Code. The Act of 1 December 2008<sup>23</sup> enacted how the cross-border transaction will be construed tax wise. Little to no application of the new procedure is shown in any publicly available information.

### 4. *Abandonment of the Prohibition on Financial Assistance in View of the Acquisition of Shares by Third Parties*

Under Belgian law, a closed limited liability company (BVBA/SPRL) and a limited liability company (NV/SA) are prohibited from providing financial means, from granting a loan, or from granting a security in view of a third party acquiring shares or profit shares in the company.<sup>24</sup>

The Royal Decree of 8 October 2008<sup>25</sup> abandons such prohibition and allows financial assistance under certain conditions. Among other things, the transaction must take place under the responsibility of the company's board of directors and on equitable market conditions. The transaction must also be approved by the company's general meeting con-

16. See Press Release, InBev, Disclosure in Accordance With the Act of May 2, 2007 (Oct. 27, 2008), available at [http://www.inbev.com/press\\_releases/20081027\\_1\\_d.pdf](http://www.inbev.com/press_releases/20081027_1_d.pdf).

17. See Press Release, Agfa, Disclosure Made According to the Requirements of the Law of May 2, 2007 (Oct. 13, 2008), available at [http://www.agfa.com/en/co/news\\_events/press\\_archive\\_months/press\\_releases/CO20081013\\_ShareFranklin\\_UK.jsp](http://www.agfa.com/en/co/news_events/press_archive_months/press_releases/CO20081013_ShareFranklin_UK.jsp).

18. See Press Release, Barco, Disclosure in Accordance With the Act of May 2, 2007: Legislative Transparency-Franklin Resources, Inc. (Nov. 5, 2008), available at <http://www.barco.com/investors/en/Press-releases/show.asp?index=2184>.

19. See Press Release, Alfacam, Disclosure in Accordance With the Provisions of the Act of May 2, 2007 (Sep. 15, 2008), available at <http://www.alfacamgroup.com/group/files/080915%20Transparantiewetgeving.pdf>.

20. See Press Release, Omega Pharma, Publication of Notifications Received in Accordance With the Act of May 2, 2007 (Sept. 26, 2008), available at [http://www.omega-pharma.be/persberichten/Persbericht\\_Kennisgeving\\_van\\_deelneming\\_door\\_Couckinvest\\_en\\_Omega\\_Pharma.pdf](http://www.omega-pharma.be/persberichten/Persbericht_Kennisgeving_van_deelneming_door_Couckinvest_en_Omega_Pharma.pdf).

21. This Act was published in the Official Belgian Gazette on June 16, 2008. Belgisch Staatsblad—16.06.2008-Ed. 2 (Belgium) available at <http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2008/06/16/10961.pdf>.

22. Council Directive 2005/56/EC, 2004 O.J. (310/1) (European Parliament and Council).

23. This Act was published in the Official Belgian Gazette on Jan. 12, 2009.

24. Article 329 § 1 Belgian Company Code; Article 629 § 1 Belgian Company Code § 1.

25. The Royal Decree of 8 October 2008, which was published in the Official Belgian Gazette on Oct. 30, 2008, addresses changes to the Corporate Code following Directive 2006/68/EC, amending Directive 77/91/EC as regards the formation of public limited liability companies and the maintenance and alteration of their capital.

vening in a specific quorum and with a special majority. The abolishment of the prohibition on financial assistance will be effective as of January 1, 2009. Also worth mentioning in the framework of the Royal Decree of October 8, 2008 is the new regulation on the acquisition, by the company, of its own shares. Whereas such an acquisition is currently limited to shares representing a value of ten percent of the share capital of the company, that limitation will be increased to twenty percent as of January 1, 2009. The new regulation also extends the board's statutory power to repurchase its own shares from the currently limited term of eighteen months to a new maximum period of five years.

### 5. *Significant Transactions*

Due to the global financial crisis, the Belgian M&A market was less active throughout 2008. Notable transactions include: the take-over bid of Belgium's n 1 telephone and communication provider Belgacom on the Dutch telecom operator Scarlet NV (n 3 in Belgium in respect of broad band internet) was made on February 15, 2008 (EUR 185 million) and only recently on November 7, 2008 approved by the Competition Regulator subject to very severe conditions.<sup>26</sup> There was also the friendly take-over of bio-tech company Innogenetics NV by the Belgian international chemical and pharmaceutical group Solvay (EUR 210 million, inclusive of debt).<sup>27</sup> And further, not to forget, there is the approved take-over bid by the Belgian-Brazilian beer brewer Inbev of Anheuser-Busch for an equity value of \$52 billion, rendering it in the biggest offer in cash ever made worldwide, and the second biggest bid on an American company (just behind the acquisition of Gillette by P&G).<sup>28</sup>

### 6. *Political Developments in Relation to M&A (Especially in the Context of the Financial Crisis)*

The Belgian governments have shown a tremendous effort in safeguarding (part of) their financial crown jewels. Multiple interventions have occurred among which the participation in recapitalizations as an emergency measure to provide banks in difficulty with liquidity participation of the Belgian government (either or not combined with the Luxembourg, or the Dutch government was necessary for FORTIS Bank DEXIA Bank, KBC Bank, and ETHIAS Insurance), the subsequent sale of FORTIS Netherlands and ABN Amro Bank<sup>29</sup> to the Dutch government and of the remainder of FORTIS to BNP Paribas, and the granting of deposit guarantees (at the benefit of the bank's customers) and of guarantees for inter-bank debts (to restore confidence between financial institutions).

26. Press Release, Belgacom, Acquisition of Scarlet by Belgacom Approved by the Belgium Competition Council (Nov. 7, 2008), available at [http://www.belgacom.com/group/gallery/content/shared/PressRelease/2008\\_11\\_07\\_scarlet\\_nl.pdf](http://www.belgacom.com/group/gallery/content/shared/PressRelease/2008_11_07_scarlet_nl.pdf).

27. See generally Press Release, Solvay, Solvay Pharmaceuticals Acquires Innogenetics: Solvay Group Holds 84.3% of Innogenetics Shares (Sept. 9, 2008), available at [http://www.solvaypress.com/static/wma/pdf/1/3/7/1/9/080909\\_ResultInnogeneticsoffer\\_EN.pdf](http://www.solvaypress.com/static/wma/pdf/1/3/7/1/9/080909_ResultInnogeneticsoffer_EN.pdf).

28. See generally Press Release, ABInBev, InBev Completes Acquisition of Anheuser-Busch, Creates One of the World's Top Five Consumer Products Companies, Company Renamed Anheuser-Busch InBev (Nov. 18, 2008), available at [http://www.ab-inbev.com/documents/press\\_release.pdf](http://www.ab-inbev.com/documents/press_release.pdf).

29. One will remember the 2007 take-over of Dutch bank ABN Amro by the consortium composed of Belgian FORTIS Bank NV, Spanish Banco Santander, and UK The Royal Bank of Scotland.

The European Commission has laid down guidelines on state aid for banks in the current global financial crisis.<sup>30</sup>

All three governments (Belgium, Netherlands, and Luxembourg) have been questioned by the E.U. Commissioner for Competition, Neelie Kroes, as to the nature of their interventions. Further, several claims have been brought before the Brussels Commercial Court to contest the sale of FORTIS to BNP Paribas. In one of the cases, the Public Prosecutor's opinion is that it was not up to FORTIS Holding's Board to decide upon the sale to BNP Paribas, but to the shareholders that should have convened in extraordinary general meeting. These proceedings have led to the resignation of both the Prime Minister and the Minister of Justice, as well as to the installation of a parliamentary commission on the distinctive powers of the legal institutions and the government. Simultaneously, a parliamentary commission on the financial crisis has been installed (completed with financial experts and former banks managers), which at the time of this contribution has already formulated what it has established: internal alarm procedures have been disregarded, DEXIA bank and ETHIS Insurance were poorly organized, and quality problems have been notified to the Commission for Banking & Insurance. Its final conclusion is that financial institutions have been guilty of excessive profit motives and poor communication (internal & external). Formal recommendations are scheduled to be published 29 April 2009. On the basis of Court of Appeals judgement (having followed the above mentioned opinion of the Public Prosecutor), an extraordinary shareholders meeting of FORTIS is scheduled on 29 April 2009 with the sale to BNP Paribas on the agenda. Expectations are that the sale will be confirmed.

## VI. Brazil<sup>31</sup>

Brazilian scholars have been discussing a topic related to foreign companies that, until recently, seemed to be a pacific matter. The debates involve whether foreign companies may participate as quotaholders in Brazilian limited liability companies without having to request previous governmental authorization. This discussion is based on the provisions of Article 1,134<sup>32</sup> of Law 10,406/2002 of the new Brazilian Civil Code (Civil Code), which foresees that foreign companies cannot operate in Brazil without authorization from the executive branch, except if they participate as shareholders in Brazilian corporations.

The revival of such discussion is due to a few recent decisions from the Brazilian courts. According to one of such decisions, the court considered that a foreign company, quotaholder of a Brazilian limited liability company, could not plead as creditor in a bankruptcy lawsuit because such foreign company, acting as a quotaholder of a limited liability company in Brazil, did not have governmental authorization to operate in the country.

30. See Communication from the Commission, 2008 O.J. (C 270/8) available at [http://ec.europa.eu/competition/State\\_aid/legislation/banking\\_crisis\\_paper.pdf](http://ec.europa.eu/competition/State_aid/legislation/banking_crisis_paper.pdf).

31. This section was authored by Cristiane Borges da Costa, Mônica Assumpção Pimentel de Mello and Marina Amaral Egydio de Carvalho, corporate lawyers at Barretto Ferreira, Kujawski, Brancher e Gonçalves – Sociedade de Advogados (BKBG).

32. Article 1,134 of the Brazilian Civil Code states that a foreign company, regardless of its corporate purpose, may not, without the executive branch's authorization operate in Brazil, even through subordinated establishments. Article 1,134 of the Brazilian Civil code also states that a foreign company may, however, except for the cases established by law, be a shareholder of a Brazilian corporation.

The opinion of the courts could lead us to believe that the participation in limited liability companies was not within the exception foreseen in the Civil Code, which expressly mentions “‘corporations” but not “limited liability companies” or any other type of company, and, therefore, a foreign company that has equity interest in a limited liability company would require governmental authorization to operate in Brazil. Another line of argument considers that the participation of the foreign companies as quotaholders of any given limited liability company is an activity that falls within the concept of ‘operation’ for the purposes of the law and, therefore, would subject such entities to previous governmental authorization.

These decisions may bring several concerns to foreign companies interested in the Brazilian market and for those that already have equity interest in Brazilian limited liability companies. First, there was a common understanding that a foreign company equity interest in a Brazilian company does not mean to ‘operate’ in the country. It seems that ‘operate’ would be adequate in case a foreign company decides to open a branch or a representative office in Brazil to perform its own corporate purposes. The mere participation of a foreign company as a quotaholder of a Brazilian legal entity does not appear to be within the concept of ‘operates’ such company inasmuch as actual operation in this case will be conducted by the Brazilian company itself. Second, obtaining authorization from the executive branch is a bureaucratic and complex procedure, which would weaken foreign companies’ interests in participating in Brazilian companies and, therefore, investing in the country. Not to mention the number of requests that the government would have to analyze and which would probably make the process even slower and more inefficient.<sup>33</sup>

A construction of this type would go against the corporate law and standards applied in Brazil in past decades. There are actually two strong legal arguments that would lead to the confirmation that participation of foreign companies as quotaholders in limited liability companies is allowed in Brazil and does not require prior authorization as a rule.

Article 1,134 of the Civil Code was copied from Decree 2,627/1940 which regulated corporations in Brazil at that time and which was partially revoked by the Corporations Law (Law 6,404/1976). The exception contained in Article 1,134 of the Civil Code is the same one that was contemplated in Article 64 of Decree 2,627/1940. Considering that such Decree specifically regulated corporations, it would not make sense for such Decree to mention any other type of company. Additionally, if we take into consideration that the Civil Code remained pending approval in the Brazilian Congress for more than twenty years (1975 – 2001), it seems plausible that the legislature when reflecting this article in the new Civil Code overlooked the other types of companies regulated therein.

It is also worth mentioning that a construction favoring the need for prior authorization establishes a contradiction in relation to other provisions of the new Civil Code, the Na-

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33. According to the last record available in DNRC’s website, in 2005 the number of limited liability companies incorporated in Brazil reached 246,722. DNRC, *Commercial Registry National Office 1985-2005*, <http://www.dnrc.gov.br/> (last visited Apr. 20, 2009). There is no official calculation of how many of these companies have foreign quotaholders. But one can infer that even if 10 percent of all such limited liability companies had foreign quotaholders, such a number (2,467) would mean a large number of requests for governmental authorization.

tional Department of Commercial Registry (DNRC)<sup>34</sup> rules, and other corporate standards.

Article 997 of the Civil Code, for instance, establishes the necessary information to be included in a limited liability company's articles of association. Among the information required when incorporating a new company is the nationality of the quotaholders of the company. If the participation of foreign parties—whether companies or individuals—was forbidden, the Civil Code would not have such provision as a mandatory requirement of the articles of association.

Further, DNRC sets up a list of documents that are necessary for the incorporation of limited liability companies that have foreign companies as quotaholders. Among those, we can mention the proof of existence of the legal entity in the country of origin or the copy of its bylaws and/or articles of association. The Boards of Trade in Brazil follow these rules and have been regularly registering the incorporation acts of limited liability companies having foreign quotaholders, which is practical evidence that a foreign company can participate in a Brazilian limited liability company.

Finally, the principle that “what is not expressly forbidden is, therefore, allowed” cannot be dismissed. If the legislator's intention was to forbid the participation of foreign companies as quotaholders in limited liability companies, this should be expressly provided for in the law.

Based on the discussion above, even though we consider it uncontroversial that a foreign company can be a quotaholder of a Brazilian limited liability company, we cannot disregard the existence of certain recent court decisions contrary to the above reasoning.

#### A. NEW LEGISLATION<sup>35</sup>

##### 1. *Corporate Developments*

Two of the most important legislative developments in 2008 were (i) CVM's (Comissão de Valores Mobiliários) understanding on upstream mergers, and (ii) the amendments made to the Brazilian Corporation Act in view of the adoption of accountancy international guidelines.

On September 1, 2008, CVM issued the Official Practice Bulletin No. 35, with guidelines to the managers of publicly held companies that shall be observed in upstream mergers or mergers of companies under the same control. The objective of this Bulletin is to reinforce Article 264 of Brazilian Corporation Act, which provides that managers who intend to carry on an upstream merger must negotiate the merger protocol, complying with their duties and to the best interests of the corporation and its shareholders.

The adoption of international accounting standards by Brazilian companies should be effective for fiscal years beginning on or after January 1, 2008. Large companies that had total assets higher than R\$240 million or an annual gross income higher than R\$300 mil-

34. DNRC is the entity responsible for establishing procedural rules in relation to incorporation of companies in Brazil.

35. This section was written by Maria Cecilia Andrade, antitrust partner and Adriana Franco Giannini, senior associate of the antitrust team of Mattos Muriel Kestener Advogados and João Otávio Pinheiro Olivério, a lawyer at the Campos Mello, Pontes, Vinci & Schiller Advogados, both law firms established in São Paulo, Brazil.

lion must now prepare financial statements in accordance with the provisions of the Brazilian Corporate Law and have these statements audited by independent auditors registered at CVM.

## 2. *Antitrust Developments*

The most relevant piece of antitrust legislation enacted in 2008 is a Notice by the administrative competition tribunal (CADE) establishing a new notification form. The main innovation is that filings must now be submitted electronically. The form is much more complete and requests in-depth economic information on substitutes, potential competitors, production capacity, import levels, controlling structure of the undertakings concerned, and other matters. Because the software necessary for electronic submission has not yet been made available by the authorities, the new form is not in force. Once the electronic filing is in place, the drafting of a merger filing in Brazil will take longer both for companies and their legal advisors, who will need to comply with the fifteen-business day deadline for submitting merger filings in Brazil.

## 3. *Interesting Takeover Cases*

### a. Acquisition of Ipiranga's Group—Ultrapar, Petrobrás, and Braskem

On March 20, 2007, Ultrapar Participações S.A. (Ultrapar), Petróleo Brasileiro S.A. (Petrobrás), and Braskem S.A. (Braskem) jointly acquired the controlling shares of Refinaria de Petróleo Ipiranga S.A. (RPI) and Distribuidora de Produtos de Petróleo Ipiranga S.A. (DPPI), starting an important step for the consolidation of essential sectors of the Brazilian economy. The transaction was structured by an agreement among Ultrapar and the Ipiranga Group's controlling shareholders. Ultrapar acts in this deal also on behalf of Braskem and Petrobras as a commission agent. The acquiring companies divided Ipiranga Group according to their respective areas of interest: (i) Ultrapar acquired the fuel and lubricant distribution businesses in the south and southeast regions; (ii) Petrobras acquired the fuel and lubricant distribution businesses in the north, northeast, and central-west regions; and (iii) Petrobras and Braskem jointly acquired the petrochemical assets.

In view of the Ipiranga Group's complex structure, the parties implemented the transaction in five steps: (i) acquisition of the shares of the controlling Shareholders of Ipiranga by Ultrapar; (ii) tender offer (tag-along rights) for the acquisition of the remaining publicly-held companies former owned by the group; (iii) tender offer for the delisting of Copesul; (iv) exchange offer the shares acquired by Ultrapar in order to realign the transaction structure; and (v) segregation of the distribution assets and petrochemical assets, and the correspondent transfer of all the petrochemical assets to Braskem and Petrobras and the northern distribution assets to Petrobras. The closing happened in 2008 after the analyses carried out by the antitrust authorities.<sup>36</sup>

36. CADE has not yet approved the acquisition of the northern assets by Petrobras. Thus, this part of the transaction was not closed.



b. Acquisition of Tenda by Gafisa (FIT)

The recent merger between Construtora Tenda S.A. (Tenda) and Fit Residencial Empreendimentos Imobiliários Ltda. (FIT), a company controlled by Gafisa S.A., one of Brazil's biggest real estate developers and constructor companies, raised important discussions on the triggering of the tag-along rights for Tenda's minority shareholder, in view of section 254-A of the Brazilian Corporation Act. This section establishes that, in case of transfer of control of a publicly held company, a public offer to buy shares must guarantee minority shareholders the value of their shares in accordance to their tag-along rights. The deal was announced on September 1, 2008.

After closing, Tenda will continue to be a publicly held corporation with its shares traded in the BOVESPA New Market. Gafisa S.A. will be the owner of 60 percent of the remaining capital stock of Tenda. Once the Tenda controlling stake changes, Gafisa would hold 60 percent of Tenda's shares through the dilution of the equity held by its former controllers. In view of several discussions on the triggering of the minority shareholders' tag-along rights (representing the payment of 100 percent of the controlling stake in this case), on September 17, 2008 CVM issued an understanding on the inapplicability of tag-along rights, given that the transaction should be viewed as a disposal of Tenda's controller shareholding.

B. POLITICAL OR ECONOMICAL DEVELOPMENTS IN RELATION TO M&A AND JV CORPORATE ASPECTS

As part of the government measures to limit the effects of the recent financial crisis in Brazil, on October 21, 2008 President Lula enacted the Provisional Measure No. 443. Such Provisional Measure authorizes Banco do Brasil S.A. (one of the largest Brazilian banks, jointly controlled by the state and private parties) and Caixa Econômica Federal (the Brazilian Federal Savings Bank) to incorporate subsidiaries for the acquisition of equity in Brazilian financial institutions, as well as to purchase government-held financial institutions without a governmental bidding process. The Provisional Measure also authorized the Brazilian Central Bank to carry out swap operations with other countries' central banks.

## VII. Canada<sup>37</sup>

After a record year in 2007 for Canadian mergers and acquisitions, with transaction volumes soaring to all time highs, 2008 was marred by the North American credit crunch. Transaction volumes suffered. Nonetheless, certain Canadian legal developments during 2008 resulted in some noteworthy issues that affect M&A activity in Canada.

A. NEW INVESTMENT CANADA ACT REVIEW THRESHOLD ANNOUNCED

For 2008, the Canadian Federal Government amended the general threshold for review under the Investment Canada Act for a direct acquisition of control of a Canadian busi-

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37. This section was written by Ken Ottenbreit and Gordon Cameron of Stikeman Elliott LLP, New York office.

ness by WTO investors to C\$295 million. This direct acquisition review threshold is adjusted annually for inflation and growth in Canada's GDP and normally refers, (a) in the case of an acquisition of the assets used in carrying on a Canadian business, to the gross book value of those assets, (b) in the case of an acquisition of control of an entity carrying on a Canadian business, to the gross book value of the assets of that entity, and (c) in the case of an acquisition of control of an entity carrying on a Canadian business and of control of one or more other entities in Canada, to the gross book value of the assets of that entity, and all other entities the control of which is being acquired.

#### B. NEW CANADIAN TAKE-OVER BID RULES EFFECTIVE FEBRUARY 1, 2008

Effective February 1, 2008, new rules governing take-over bids and issuer bids were introduced across Canada. The focus of the new rules was to harmonize and consolidate the Canadian take-over bid (i.e. tender offers) regimes in Canada; however, their introduction will also result in some changes to the previous rules such as broader and/or more flexible exemptions. For example:

- The new rules contain express exemptions from restrictions against collateral agreements for certain enumerated employment-related arrangements.
- The current exemptions for bids carried out in accordance with the laws of a foreign (i.e. non-Canadian) jurisdiction have been broadened.
- Although all holders of the same class of securities must still be offered identical consideration if a formal bid is made, the new rules specifically allow for the offer of an identical choice of consideration.

In conjunction with the implementation of these new bid rules, the Ontario Securities Commission and the *Autorité des marchés financiers* (Quebec securities regulator) are also implementing a new joint rule regarding protection of minority shareholders in special transactions. These new rules prohibit a member of an independent committee from receiving any payment or benefit that is contingent upon completion of a transaction. The new rules also clarify that the valuation exemption for unlisted issuers is available to those listed on the AIM or PLUS markets.

#### C. MINISTER OF FINANCE RELEASES RULES FOR INCOME TRUST CONVERSIONS

The Minister of Finance released draft legislative proposals that implement certain measures from the 2008 Federal Budget together with certain previously announced tax changes, including certain proposals to amend the rules relating to specified investment flow-through (SIFT) trusts and partnerships that were announced in December 2007. In addition, the proposals contain the rules for allowing a SIFT trust to convert into a publicly traded corporation without adverse consequences for the trust or its unit holders. The SIFT conversion rules generally allow the unit holders of a SIFT trust to transfer their units of the trust to a corporation in exchange for shares of the corporation on a tax deferred basis. Although such a transfer is possible under the current Income Tax Act, the new rules allow this transfer tax to be deferred without filing a joint election by the unit holder and the corporation. In addition, the new rules will allow the trust and its subsidiary trusts to be subsequently wound up into the corporation without adverse tax consequences and will permit the flow-through of certain tax attributes of the trust and its subsidiary trusts to the corporation. Alternatively, a SIFT trust (or a subsidiary trust of a

SIFT trust) whose only asset is shares of a taxable Canadian corporation may wind-up and distribute the shares of the corporation to its beneficiaries on a tax deferred basis.

The SIFT conversion rules will apply to conversions effected after July 14, 2008 and before 2013.

**D. MERGER TALKS ARE NOT A REPORTABLE MATERIAL CHANGE UNLESS PARTIES ARE COMMITTED AND SUCCESS IS LIKELY, OSC PANEL RULES**

In its widely anticipated ruling of *Re AiT Advanced Information Technologies Corp.*, the Ontario Securities Commission (OSC) held that the obligation to disclose a potential merger as a "material change" under section 75 of Ontario's Securities Act does not apply to proposed mergers and acquisitions until the board believes that the parties are "committed" to the transaction and that completion is substantially likely.

A noteworthy aspect of the ruling is its recognition that the target board's duty to report may depend in some cases on the nature of the acquirer. In particular, where the acquirer is a large company, the rigors of its due diligence requirements and the multiple internal hurdles that may have to be surmounted before it can give final sign-off on a deal may mean that a transaction is not "substantially likely" until very late in the negotiation process. In the case at hand, the OSC panel agreed that, in light of the size and internal review procedures of the buyer (and other factors pointing to the contingent nature of the transaction), disclosure was not required until the final documentation was actually signed. One significant take-away from this decision is that the board of a relatively small target may often be entitled to suspect the degree of "commitment" of a larger and more bureaucratic acquirer until the last of the acquirer's significant internal hurdles have been surmounted.

## **VIII. Chile<sup>38</sup>**

The rejection by the Antitrust Court of the merger between Falabella and D&S, the securities authority's increasing activity in prosecuting insider trading cases, widespread adoption by public companies of black-out periods, and a new bill in Congress on corporate governance and securities market regulation (including a squeeze-out proposal for the first time ever in Chile) are the main legal news to report during 2008.

**A. REJECTION OF THE FALABELLA-D&S MERGER**

On January 31, 2008, the Antitrust Court rejected the merger announced on 2007 between D&S and Falabella. D&S is the largest supermarket chain in Chile; Falabella is the largest Chilean retail company, with a foothold in Argentina, Colombia, México, and Perú, and a leader in department stores, home improvement, drug stores, travel, and insurance brokerage services. Both companies are also strong in the financial industry, operating their own credit cards.

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38. This section was authored by Francisco Ugarte, Cristián Eyzaguirre, and Felipe Moro, of Carey y Cia. Ltda. Abogados.

This is the first time that the Antitrust Court did not approve a transaction submitted to consultation. According to Resolution No. 24/2008, the Antitrust Court ruled that it was impossible to apply mitigation measures to diminish the risk of damage to competition. Regarding the efficiencies alleged by the parties, the Antitrust Court found that they were not duly proved—after careful consideration of the efficiencies arising from the proposed transactions, and whether they would be effectively transferred to final consumers. If the Antitrust Court had approved the merger, the new entity resulting from the merger of Falabella and D&S would have been the largest player in the retail market in Chile and only second to Wal-Mart Mexico in the region.

#### B. INCREASING PROSECUTION ACTIVITY ON INSIDER TRADING

During 2008 the Chilean securities authority (the SVS) has been increasingly active in prosecuting several individuals for use and disclosure of inside information, in a clear intention to raise the awareness of the securities markets on this issue. The main cases relate to (i) trading by directors prior to the public release of quarterly financial statements, and (ii) trading by individuals involved in the failed merger between Falabella and D&S.

The SVS fined several directors of LAN (the major airline in Chile) and Besalco (one of the prominent construction and real estate companies in Chile) who bought stock issued by their respective companies between the approval by the board of the quarterly financial statements and the release of such statements to the public by means of uploading them to the SVS' web page. According to the SVS, the information of the quarterly reports shall be deemed material *per se*, and therefore, no director may trade shares issued by his/her company before the quarterly reports are public. Furthermore, the Chief of the SVS asserted that the latter would be true even if the information in such reports is already projected by analysts or if once disclosed the stock price does not vary substantially.

In connection with the merger negotiations among the controlling shareholders of Falabella and D&S, the SVS concluded that three persons breached their duty of reserve (a board member of D&S, a member of the controlling group of Falabella with thirteen percent of the capital stock, and an external communications consultant to D&S). In addition, the SVS fined on insider trading charges the relatives and spouses of the above-mentioned individuals.

The SVS reasoned when imposing the fines that irrespective of countless market rumors and press articles published at the time, only those who took part in or were privy to the negotiations knew for certain—not merely as hearsay—of the existence of such negotiations, knew their progress, were knowledgeable about the partial agreements being adopted, and ultimately could make a more accurate forecast of the probability of success of such negotiations. Therefore, knowledge of the latter facts was only available to those individuals directly involved in the negotiations, who were hence subject to the duties and prohibitions prescribed by the law. With this case, the SVS clearly establishes that it will broadly construe the term “relationship” contained in the Securities Market Law, including relatives, business acquaintances, friends, and others. Also, according to the SVS the concept of “inside information” has to be understood on a broad sense, including not only a given agreement that may result from a negotiation, but also the negotiation itself. The defendants currently challenge most of the SVS fines in court.

### C. BLACKOUT PERIOD

Together with the insider trading cases referred to above, the SVS enacted a rule imposing all public companies to adopt an internal handbook for information management, which may also include (on a voluntary basis) each company's policy as to black-out periods during which board members and other employees may not trade the company's securities (such handbook shall also establish internal policies regarding procedures, controls, and responsibilities for the purchase or sale of the company's securities or other type of securities whose price depend significantly on the price of such securities). Prior to this rule, no public company in Chile had a policy regarding blackout periods. Interestingly, most public companies have now adopted a blackout period—differing in length—prior to the date of disclosure of their financial statements.

### D. SQUEEZE-OUT

Capital markets' regulations in Chile have undergone several amendments in the past decade tending to level Chilean standards to those existent in developed countries. But the real "kick-off" of the process for the M&A practice started in the year 2000 with the enactment of the so-called "Tender Offer Law." Tender offer procedure is now mandatory for anyone seeking to acquire control of a stock company that "publicly offers its stock or convertible securities," unless an exception is expressly provided by law.

This process of reform has continued with the enactment of laws known as the "First Reform to the Capital Markets" (2001) and "Second Reform to the Capital Markets" (2007), aiming to enhance the Chilean capital markets and safeguard its proper operation. The latest reform promoted by the government, currently under discussion in the Chilean Congress (the Bill), proposes to introduce improvements to corporate governance regulations and fine-tune certain aspects of mandatory tender offer procedures.

The current scenarios for mandatory tender offers are amended (i) to include not only individuals or legal entities but also entities related by means of agreements of joint action (*acuerdos de actuación conjunta*), a concept already defined in the securities market law, and (ii) to eliminate the requirement of a mandatory tender offer upon acquiring two-thirds or more of the voting stock of a company that makes public offer of its stock, if such threshold is exceeded as a result of a tender offer for all the shares of the company (i.e., minority shareholders of the company have already been provided with an opportunity to sell their stock).

The Bill also analyzes and amends other matters, such as withdrawal rights and squeeze-outs. The Corporations Law is amended to provide for withdrawal rights if an entity acquires ninety-five percent or more of the stock of a public company. The same law is amended to authorize an entity that has acquired ninety-five percent or more of the stock of a public company, to force the minority shareholders that did not exercise their withdrawal rights to sell their shares to the controlling shareholder, as long as the squeeze-out is provided for in the bylaws of the company and the percentage mentioned above is obtained by means of a tender offer for all the shares of the company (or the applicable series), among other conditions. The price payable to the minority shareholders for their stock shall be the one offered in the tender offer duly adjusted by inflation plus interest.

It is uncertain whether the squeeze-out provisions outlined above would become law, as is being debated, if such provisions may be considered unconstitutional in connection with the property rights stated out in the Chilean constitution. The Bill is still under discussion and its provisions may vary substantially.

## IX. China<sup>39</sup>

China agreed to contribute to a U.S. \$80 billion fund to help Asian countries overcome their liquidity difficulties.<sup>40</sup> It has also helped reshape the Western-dominated international financial system by hosting a meeting of European and Asian leaders, where these leaders decided to undertake "effective and comprehensive" reforms and by participating actively in the G20 financial summit held in Washington in November 2008.<sup>41</sup>

Despite such a prominent role at the international level, Beijing has reiterated that its primary focus is to maintain domestic economic growth.<sup>42</sup> To this end, China has, among other measures, cut interest rate several times,<sup>43</sup> loosened its tight control on commercial banks' lending plans,<sup>44</sup> given bigger tax breaks to exporters, reduced property transaction costs, and authorized more spending on infrastructure projects.<sup>45</sup> In particular, China's Ministry of Commerce has announced, though without providing details, that it will create more financing channels to support "qualified Chinese firms" to engage in international M&A.<sup>46</sup>

These steps taken by China have two major implications for the global M&A market. The first one is that M&A activity in China will likely gain momentum in the near term, compared with other countries in the West. The government's rescuing efforts helped stabilize the financial turmoil but cannot completely restore investors' confidence immediately. Financing for deals will remain conservative. The outlook of the overall M&A market is thus gloomy. Yet China is expected to continue having robust M&A activity.<sup>47</sup> In fact, the Asia-Pacific region was the only region that showed an increase (one percent) in the M&A volume during the first three quarters of 2008 over the same period in 2007.

39. Mei Y. Gechlik, Lecturer in Law and Microsoft Rule of Law Fellow, Stanford Law School, Stanford University, authored this section.

40. See *China Moves to Centre Stage; The Credit Crunch*, ECONOMIST, Nov. 1, 2008, available at [http://www.economist.com/world/asia/PrinterFriendly.cfm?story\\_id=12511197](http://www.economist.com/world/asia/PrinterFriendly.cfm?story_id=12511197).

41. See *Wen Says China to Participate Actively in Nov. 15 Summit*, XINHUA FIN. NETWORK NEWS, Oct. 27, 2008.

42. See *Brown Calls for Gulf and China to Give IMF Billions for 'Distressed Economies'*, BIRMINGHAM POST, Nov. 3, 2008.

43. See *Analysis: China Joins Global Response To Crisis With Rate Cut*, MAIN WIRE, Oct. 8, 2008.

44. See Kathy Wang, *PBOC Loosens Lending Rein Amid Credit Crunch*, STANDARD, Nov. 3, 2008, available at [http://www.thestandard.com.hk/news\\_detail.asp?we\\_cat=2&art\\_id=73756&sid=21283031&con\\_type=1&d\\_str=20081103&fc=1](http://www.thestandard.com.hk/news_detail.asp?we_cat=2&art_id=73756&sid=21283031&con_type=1&d_str=20081103&fc=1).

45. See, e.g., Jason Subler, *China Reports a Healthy Economy, but Prepares for Effects of Crisis*, THE INT'L HERALD TRIB., Oct. 27, 2008; *Wen Says China to Participate Actively in Nov. 15 Summit*, XINHUA FIN. NETWORK NEWS, Oct. 27, 2008.

46. See Hao Zhou, *Commerce Ministry Foreign Investment Strategy Unchanged*, CHINA DAILY (Oct. 22, 2008), available at [http://www.chinadaily.com.cn/bizchina/2008-10/21/content\\_7126418.htm](http://www.chinadaily.com.cn/bizchina/2008-10/21/content_7126418.htm).

47. See, e.g., Conrad Tan, *Rich Pickings for Savvy Investors; With the Drying Up of Cheap Debt, the Outlook for M&A Activity Appears Bleak. But Opportunities are Emerging*, THE BUSINESS TIMES SINGAPORE, Oct. 22, 2008; Michelle Lore, *Mergers and Acquisition Experts Discuss Deals in Difficult Times at Conference in Minneapolis*, MINNESOTA LAW., Nov. 3, 2008.

Deals in Europe and the United States declined almost thirty percent. The exceptional success in the Asia-Pacific region was attributed to remarkable performance in China and Australia.<sup>48</sup>

A few reasons explain the good prospects of the China M&A market. China's GDP, though forecast to slow to 9.4% by the end of 2008,<sup>49</sup> is still much faster than that in the West. Big companies in the country have an ongoing thirst for strategic acquisitions. Furthermore, seeing China as an important player to help stabilize the global economy and encouraged by China's measures for maintaining its rapid economic growth, foreign investors who look for a market that is less affected by the financial crisis and that also allows them to cut costs and enhance competitiveness should explore M&A opportunities in China.

The second major implication is that China-backed companies and funds will likely seize the opportunity to have more overseas M&A. China's interest in having M&As that are more international is clearly reflected in the above-mentioned announcement made by the Ministry of Commerce. Data also show China's growing appetite for outbound investment. The foreign investments of China's non-financial industries during the first six months of 2008 tripled the number of the same period in 2007 to reach US\$25.66 billion.<sup>50</sup>

With a US\$1.9 trillion reserve, China is undoubtedly capable of providing financial support for its companies to pursue M&A abroad. At a time when there is less competition in the international M&A market and when assets are priced lower, this strategy makes perfect sense.<sup>51</sup> In addition, through international M&A, Chinese companies can gain scale and access new markets. They can also acquire technologies and manufacturing capacities. Above all, China can convert its foreign exchange assets into strategic resource assets such as oil and minerals.

## X. Croatia<sup>52</sup>

The year 2008 was dynamic in Croatian legislation due to the process of harmonization of the Croatian with the European Union legislation. Croatia is expected to finalize the negotiations for admission into European Union by the end of 2009 and to become a member of European Union during 2010 or 2011.

After passing new Joint Stock Companies Takeover Act in the year 2007, the most important legislative changes in the field of International M&A and JV in 2008 were amendments of the Companies Act that became effective on April 1, 2008 and the Capital Markets Act that was passed in July 2008 and will become effective from January 1, 2009.

48. See Gordon Platt, *Credit Crunch and a Slowing Economy Crimp Worldwide Buyout Activity, Putting Strategic Buyers in Control*, GLOBAL FIN. MAG., Nov. 2008.

49. See Rating Agency Report: *China's GDP to Slow to 9.4 Percent in 2008*, CHINA VIEW (Nov. 2, 2008), [http://news.xinhuanet.com/english/2008-11/02/content\\_10295949.htm](http://news.xinhuanet.com/english/2008-11/02/content_10295949.htm).

50. See Zhou, *supra* note 46.

51. See, e.g., Tan, *supra* note 47.

52. Miroљub Macešić, Attorney at Law, Law Offices Macesic & Partners, authored this section.

## A. NEW LEGISLATION IN 2008

1. *New Regulation on Cross-Border Mergers*

Amendments of the Companies Act (ACA), in Articles 549a–549k, for the first time in Croatia provide the legal frame for cross-border mergers. Provisions implement Directive 2005/56/EC of the European Parliament and Council of October 26, 2005 into Croatian legislation, which form part of the overall process of harmonization of Croatian with the E.U. legislation. The provisions regarding cross-border mergers will enter into force with the date of admission of Croatia into European Union.

ACA defines cross-border mergers as the mergers between Croatian companies on one side and any of the companies incorporated in accordance with the legislation of any of the E.U. Member States or parties to the European Economic Area Agreement on the other side. The stages of the cross-border merger are: adoption of the merger plan by the managing directors of the merging companies; registration of the merger plan with the Company Register; announcement of the merger plan; and drafting of a merger report with the review of the legal and economic aspects of the merger. The latter is followed by a merger audit, General Assemblies decisions on merger, and finally registration of the merger with the Company Registers of the Commercial Courts.

2. *Developments in Capital Market Regulation*

On July 8, 2008, Croatia adopted a new Capital Markets Act that completely harmonizes Croatian legislation regarding capital markets with fifteen E.U. Directives and three Regulations. It enters into force on January 1, 2009, while some provisions will enter into force with the date of admission of Croatia into the European Union. This new legislation entirely replaces the previous Securities Market Act (Official Gazette No. 84/02 and 138/06).

The Capital Markets Act is rather comprehensive, with more than 500 articles regulating terms of incorporation, business activity, supervision, and termination of investment companies, stock exchanges as securities markets, terms for providing investment services and performing investment activities, terms of trading on the regulated market, terms for offering securities to the public and admission of securities to trading on the regulated market, publication of information which refer to securities admitted to the securities regulated market, and market abuse. Special authorities regarding the implementation of the Capital Markets Act in accordance with the Croatian Financial Services Supervisory Agency Act are given to Croatian Financial Services Supervisory Agency (HANFA), as the supervisory and regulatory body.

The importance of the new Capital Market Act is that it increases the efficiency of investment procedures, imposes high transparency standards, and implements new internal supervision systems which finally lead to higher protection of clients' interested in investments in Croatian market. Furthermore, it opens the possibility for E.U. investment companies to participate directly in the Croatian security market.



## B. MERGERS AND ACQUISITIONS IN 2008

Expectations for 2008 were positive after previous years that proved to be a tuning period for the Croatian capital market. The big takeover of Pliva by Barr and several IPOs (i.e. National Telecommunications Company T-HT) showed that the Zagreb Stock Exchange (ZSE), the HANFA, and Central Depository Agency (SDA) make a market that is mature and capable. Although several companies, among which Croatia Osiguranje (the state-owned insurance company with largest market share) and HEP (the state-owned national electrical power provider), announced possible public offerings for the year 2008 the global recession affected the local market, and all activities were slowed down or postponed for the time-being.

### 1. *Privatization Plan of INA*

The equity transaction that marked the year 2008 in Croatia was the acquisition of twenty-two percent share of the Croatian Oil Company (INA) by the Hungarian Oil and Gas Public Limited Company (MOL). In previous years the privatization plans of INA, as set out in the INA Privatization Act, was being enacted so that at the beginning of 2008 the strategic partner MOL owned twenty-five percent, plus one stock (with a five year lockup period), institutional investors, and private investors owned approximately twenty-four percent, the Veteran's Investment fund seven percent, and the government approximately forty-four percent. The government still has the option to sell the remaining stocks on the stock exchange or exchange it with stocks of the strategic partner or on the market. Out of the remaining stock twenty-five percent, plus one stock could be privatized only after admission into to the European Union.

### 2. *Friendly Takeover by MOL*

In the second half of 2007, the Austrian Oil Company OMV tried to take over MOL, however the takeover attempt was considered hostile and failed. In April of 2008, the legal lockup period for stocks of the Veterans Fund expired, and at that time OMV began to express interest in the takeover of the INA. In July MOL also issued a letter of intent of friendly takeover of INA, hence, under the Croatian Takeover of Joint Stock Companies Act MOL was obliged to issue a friendly takeover offer. The market was expecting a price between 2.600,00 kn and 3.500,00 kn. When HANFA announced on September 1st that the takeover price was 2.800,00 kn, the market predicted small interest in the offer. However, during the takeover offering, the global depression deepened and the offered price became acceptable to shareholders. At the end, MOL took over an additional twenty-two percent of stock from private and institutional investors, with the result that the State lost its position of majority shareholder and MOL became the biggest shareholder with 47.15%.

### 3. *Privatization of Shipyards*

The Croatian Government is also under pressure due to the process of accession to the European Union to privatize six state-owned shipyards (Uljanik Pula, three Maj Rijeka, Brodosplit Split, Brodosplit-Brodogradilište specijalnih objekata Split, Brodogradilište Kraljevica). The government is due to announce a tender by the end of the year. The

four shipyards with losses will be sold at a symbolic price, while the remaining two will be probably sold at market price. The terms of sale are not known, however, according to unofficial information, the government will attempt to sell the shipyards for a symbolic 1 kn with the obligation of the buyer to invest in the companies with minimal diminishment of employees, no more than twenty percent, and minimal reduction of shipbuilding core business of no more than forty percent. It is expected that the year 2009 will see the privatization of state-owned shipyards.

## **XI. Germany<sup>53</sup>**

Corporate M&A activity dropped significantly in Germany in 2008. Any rebound would require confidence to return and debt financing to become more readily available. However, another likely M&A activity driver could be the divestment process. Most of Germany's companies have started to streamline their operations by spinning off non-core business units, and prospective buyers are lining up to take advantage of divestitures of under-performing assets.

### **A. NEW LAW ON RESTRICTION OF FOREIGN INVESTMENTS IN GERMANY**

Although the German Federal Government faced significant criticism,<sup>54</sup> it went ahead with its plan to further control and restrict foreign investments in German companies.

### **B. THE NEW REGULATION**

On August 20, 2008, the German Federal Cabinet of Ministers adopted a new legislative proposal that amends the Foreign Trade Act (*Aussenwirtschaftsgesetz* or AWG) and of government regulations based on the AWG, the Foreign Trade Ordinance (*Aussenwirtschaftsverordnung* or AWW). According to the new Section 7 para. 2-6 AWG, the Federal Ministry of Economics and Technology has not only the power to review an acquisition<sup>55</sup> of significant holdings (twenty-five percent and more) in German enterprises by a non-E.U. investor but is allowed to authorize it under certain conditions or even prohibit the acquisition if public policy or public security is deemed to be jeopardized.<sup>56</sup>

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53. This section on Germany was authored by Susanna Fuchsbrunner, counsel at King & Spalding LLP, Frankfurt.

54. For instance, by the Federal Association of Industrial Companies (BDI). The BDI also claims that the new act violates E.U. law as being insufficiently precise as to the scope of application. Considering that similar legislation has been in force in France since 2005, which does not seem to be objected to by the European Union, it does not appear likely that it will prevail.

55. However, the foreign investor is not obliged to notify the government of the intended acquisition and any review is restricted to the first three months after a purchase agreement has been signed, a tender offer has been published, or the control was acquired.

56. Specifically, a transaction may be restricted if it relates to an acquisition of a domestic enterprise or of shares in such an enterprise by purchasers domiciled outside the European Union and outside the E.F.T.A. countries (Iceland, Liechtenstein, Norway, and Switzerland), if "as a result of such acquisition the public policy or public security of the Federal Republic of Germany [within the meaning of Articles 46 and 58 para. 1 of the Treaty establishing the European Community] is jeopardized; this pre-supposes that there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society."

To fall within the scope of the new law, the acquisition must result in shareholdings of twenty-five percent or more.<sup>57</sup> Any holdings by third parties will count for that percentage if the investor holds twenty-five percent or more in such third party or if there is a pooling of votes arrangement in place. Further, any investor is deemed to be domiciled outside the European Union even if it has a branch or permanent establishment within the European Union. In addition, acquisitions by investors domiciled within the European Union can be prohibited if a person domiciled outside the European Union holds twenty-five percent or more of the voting rights (so that the potential restriction cannot be circumvented by acting through a holding entity in an E.U. country which has no such restrictions).<sup>58</sup>

Although the proposal does not yet specify any criteria for when "public security and order" is to be deemed to be in danger of being breached, the government is expected to exercise its authority only in "rare cases," in line with E.U. case law and only where there is "a genuine and sufficiently serious threat affecting one of the fundamental interests of society."

Under the procedural rules of the new Section 53 AWV,<sup>59</sup> the Federal Government is entitled to commence an examination of all acquisitions within the scope of the new provision within three months after signing (or after publication of a public tender offer). If it does not exercise its authority, the transaction becomes effective after the expiration of a three-month-period.<sup>60</sup> If it decides to review the acquisition, the Federal Government will notify the purchasing party who is then obliged to submit all documents concerning the transaction (Section 53 para. 2 AWG). Within two months following the date when it has received all information, it may prohibit the acquisition or request amendments that the purchaser has to comply with (Section 53 para. 4 AWG), provided that this essential for securing the public order or safety in Germany.<sup>61</sup> If a prohibition order is issued, the transaction becomes null and void retroactively (Section 31 para. 3 of AWG), and if the closing should have occurred all share or asset transfers would have to be reversed.

Because there is no notification requirement,<sup>62</sup> there will be no additional filing requirement. The effectiveness of a transaction, however, may be in question for up to around six months after signing. It may therefore be advisable to apply for negative clearance in all cases where non-applicability of the rules is not completely obvious and to delay closing until it has been obtained.<sup>63</sup>

57. Under German corporate law, a shareholding of twenty-five percent or more constitutes a threshold which entitles a shareholder to a veto power, in particular with regard to any changes of the articles of association and the issuing of new shares.

58. By extending to foreign investors resident in the European Union, the draft act raises concerns regarding compliance with European law and is currently being reviewed by the European Commission.

59. Another question is whether Section 53 para. 1 AWV is consistent with the E.U. Treaty.

60. Technically, the purchase agreement is under a condition subsequent that the government prohibits the transaction. Upon request, the government will issue a negative clearance certificate if there are no concerns with respect to public policy or security (§ 53 para. 3 AWV).

61. According to E.U. case law, to meet that requirement, there must be a real and sufficiently severe danger affecting vital interests of society.

62. The Federal Minister of Economic Affairs, which is responsible for enforcement of the rules can or must be informed by other authorities who may be involved in the transaction, namely the Federal Cartel Office if there are German anti-trust filings and the Federal Agency for Financial Services if there are filings under the securities regulations.

63. In fact, the application can even be filed even before signing.

## C. REASONS OF THE LEGISLATIVE CHANGE

The political reason behind this legislation concerns the increasing purchasing power of sovereign funds in countries such as China, Russia, and the Gulf states. However, there is no indication of that in the draft legislation, nor would these rules be limited to such investors. Further, it should be noted that regulations similar to the new proposal are already in force in Germany. Although current regulations to control foreign investments apply only to domestic businesses in the arms industry (production and development of military weapons) and the area of encryption technology (§ 52 AWV),<sup>64</sup> the new law would extend to all foreign investors and all sectors.

XII. India<sup>65</sup>

## A. PRE-MERGER NOTIFICATION REQUIREMENT

The pre-merger notification requirement, introduced by a September 2007 amendment to the Competition Act, 2002 (Competition Act), is yet to come into force. The applicable provisions of the Competition Act have not been notified in the *Official Gazette*. Draft regulations have been issued for comment, in the meantime.

The amended Competition Act requires that the parties to a merger or acquisition notify the Competition Commission of India (Competition Commission) if the proposed combination exceeds the threshold limits specified in the Competition Act. Notice must be given within thirty days of (a) approval of the proposal for merger by the board of directors of the concerned enterprises or (b) execution of any agreement or other document for the acquisition or acquiring control of another enterprise.<sup>66</sup>

The Competition Commission then has 210 days to give its decision. No combination can come into effect until approval is received or 210 days have elapsed.<sup>67</sup> In essence, a proposed qualifying merger or acquisition must be put on hold during this time.

## B. TAXATION OF OFFSHORE M&amp;A TRANSACTIONS—THE VODAFONE CASE

M&A transactions involving non-residents are receiving increased scrutiny from income tax authorities in India. The tax authorities have been taking a very aggressive position vis-à-vis taxing non-residents on gains realized in offshore transactions that have an India connection. The proceedings in *Vodafone Essar Limited v. Union of India, Ministry of Finance*,<sup>68</sup> (Vodafone) pending before the Bombay High Court are a case in point. They amount to a significant expansion of the extra territorial effect of Indian income tax laws,

64. Under the new law, any foreign investor that wishes to acquire more than 25 percent of the shares in an arms or encryption manufacturer is obliged to notify the German Federal Ministry of Economics and Technology of the intended investment, Section 7 para. 1 no 2 and para 2 no 5 AWG. The government can prohibit the proposed transaction within one month if it is essential for securing the public order or safety in Germany.

65. Anand S. Dayal, Koura & Company, Advocates and Barrister, New Delhi, India authored this section on India.

66. Competition Act, 2002 (as amended) § 4.

67. Competition Act, 2002 (as amended) § 31.

68. Writ petition no. 1942 of 2007 (Bombay High Court, 2007).

and are being closely watched as they could adversely affect overseas M&A transactions indirectly involving an Indian subsidiary.

The Vodafone case arose from the purchase in 2007 by Vodafone International Holdings BV, a Dutch company, from a Cayman Islands company, of shares in a Cayman Islands holding company. The holding company held an indirect interest in a mobile phone company in India. Both the buyer and seller were non-residents (and therefore not otherwise subject to tax in India) and the capital gain arose from the transfer of shares in a holding company outside India. The holding company held its interest in the Indian company through a series of tax haven companies.

The tax authorities contend that the gain arising from the offshore transaction is taxable in India as it arises from the transfer of a capital asset located in India, namely the shares in the Indian mobile phone company. Accordingly, the tax authorities argue that the gains are "deemed to accrue or arise in India" under section 9(1) of the [Indian] Income Tax Act, 1961, and are therefore taxable in India.<sup>69</sup>

### C. FOREIGN OWNERSHIP CAPS—MIXED TRENDS

The government continues to pursue foreign direct investment (FDI) by increasing caps on foreign ownership and loosening conditions on foreign investment. However, the trend has been mixed; there are activities (commodity exchanges and credit information companies) wherein new caps and other restrictions on foreign ownership have been imposed which did not previously exist. Also, certain sectors continue to remain off-limits for foreign investors; including real estate (other than in a narrow range of qualifying projects) and retail (other than single brand stores), and there is no increase in the foreign ownership cap (twenty-six percent) for insurance companies. The key policy changes are summarized here:

- Civil aviation (air transport services)—cap on foreign ownership increased from forty-nine percent to seventy-four percent for non-scheduled airlines, chartered airlines and cargo airlines (but not for scheduled domestic airlines), subject to there being no direct or indirect participation by foreign airlines (except in case of cargo airlines). Certain related activities have also been opened up for foreign investment, subject to specific conditions.<sup>70</sup>
- Petroleum and Natural Gas (trading and marketing of petroleum products)—the existing cap (100%) on foreign ownership was freed of the somewhat burdensome condition that a compulsory divestment of twenty-six percent of the equity be made in favor of domestic shareholders within five years.<sup>71</sup>
- Petroleum refining—cap on foreign ownership increased from twenty-six percent to forty-nine percent for government-owned refining companies. Private refining companies were already allowed to be 100% foreign owned.<sup>72</sup>
- Commodity exchanges—composite cap of forty-nine percent on foreign ownership comprised of sub-caps of twenty-six percent on FDI, twenty-three percent on for-

69. See *In re. Trinit Corp.*, 165 Taxman 272 (AAR New Delhi, 2007).

70. Press Release, Government of India Ministry of Commerce & Industry, Consolidated Policy on Direct Investment (2008) available at [http://siadipp.nic.in/policy/changes/pn7\\_2008.pdf](http://siadipp.nic.in/policy/changes/pn7_2008.pdf).

71. *Id.*

72. *Id.*

eign institutional investment (FII), and five percent by any single investing entity. Prior governmental approval is required for any FDI, and all FII share purchases are restricted to acquisitions on the secondary market.<sup>73</sup>

- Credit Information Companies—composite cap of forty-nine percent on foreign ownership with a sub-cap of twenty-four percent on FII investment with no single FII directly or indirectly owing more than ten percent. Additional conditions apply.<sup>74</sup>

In the case of commodity exchanges and credit information companies, the changes impose new restrictions that did not exist previously. The existing policy had neither specifically prohibited foreign ownership nor affirmatively allowed it in the sector-specific policy statements forming part of the FDI policy. Therefore, these activities previously fell within the residuary category of activities not specifically excluded, for which 100 percent foreign ownership was permissible.

#### D. FOREIGN CURRENCY EXCHANGEABLE BONDS SCHEME MADE EFFECTIVE

The RBI has issued implementing regulations for the Foreign Currency Exchangeable Bonds Scheme, 2008 announced by the Ministry of Finance in February 2008.<sup>75</sup> The scheme allows an Indian company to issue Foreign Currency Exchangeable Bonds (FCEBs) which are exchangeable at the option of the holder into equity shares in a company (offered company) listed on the stock exchange in India other than the issuing company (so long as both companies belong to the same promoter group).<sup>76</sup>

Key features of the FCEB scheme are summarized below:

- FCEBs are denominated in foreign currency, and may be subscribed only by a person resident outside India. Both principal and interest are payable in foreign currency. Denomination in any freely convertible currency is permissible.
- FCEBs are a form of foreign debt (external commercial borrowings or ECB), and must comply with the government's ECB policy. The ECB policy restricts the end-use of borrowed funds; such funds must be used only to import capital goods, make investments outside India, or meet other limited prescribed expenditures. In any event, FCEB proceeds cannot be invested in the capital market or real estate in India. In addition, the ECB policy prescribes an "all-in-cost" ceiling (comprised of interest and other charges) that the FCEBs must comply with.
- The exchange (conversion) price is subject to a floor linked to the share price for the offered shares prevailing in the stock market at the time of issuance of the FCEB. The minimum maturity for redemption of the FCEB must be five years. The exchange option can be exercised at any time before redemption.
- The offered company must be listed in India and engaged in activities that are eligible to receive foreign direct investment under the FDI policy of the government.

73. Gopal Krishna, RIB, *Foreign Investment in Commodity Exchanges – Amendment to the Foreign Direct Investment Scheme*, AP (DIR Series) Circular No. 41 (Apr. 28, 2008).

74. Gopal Krishna, RIB, *Foreign Investment in Credit Information Companies – Amendment to the Foreign Direct Investment Scheme*, AP (DIR Series) Circular No. 40 (Apr. 28, 2008).

75. Ministry of Finance, *Issue of Foreign Currency Exchangeable Bonds (FCEB) Scheme, 2008*, Notification GSR 89(E) (Feb. 15, 2008).

76. Gopal Krishna, RBI, *Issue of Foreign Currency Exchangeable Bonds Scheme, 2008*, AP (DIR Series) Circular No. 17 (Sept. 23, 2008).

This means caps on foreign ownership must be complied with, and where necessary prior approval of the Foreign Investment Promotion Board must be obtained. In all cases, prior approval of the RBI is required to issue FCEBs.

#### E. OUTBOUND INVESTMENT—ENERGY AND NATURAL RESOURCES SECTOR

Outbound investments by Indian companies are encouraged by the government.<sup>77</sup> The aggregate outbound investment however is limited to 400 percent of the net worth of the Indian acquirer under the “automatic” route (without prior government approval). These restrictions have been relaxed in the case of overseas investments in the petroleum and natural resources sector, as described below.

- Investments in “energy and natural resources sectors, such as oil and gas, coal and mineral ores” are no longer capped at 400 percent of the net worth of the investing Indian company.<sup>78</sup> The cap can be exceeded only with prior approval of the RBI.
- Investments in government-approved overseas unincorporated entities in the upstream petroleum sector (exploration and drilling for oil and natural gas) are permitted under the automatic route.<sup>79</sup> Previously investments in unincorporated entities outside India were not allowed, except by certain public sector oil companies.

#### F. BAN ON FOREIGN INVESTMENT VIA PARTICIPATORY NOTES LIFTED

The Securities Exchange Board of India (SEBI) lifted the ban imposed in October 2007 on the issuance by FIIs of offshore derivative instruments (such as participatory notes (PN)) to overseas investors in the Indian stock market. In October 2008, SEBI removed the ban.<sup>80</sup> Removal of the ban was intended to stimulate FII investments, as the stock market was experiencing heavy FII redemptions in response to global economic conditions.

#### G. COMPANIES BILL, 2008

The new Companies Bill, 2008 was approved by the Union Cabinet on September 29, 2008. It will, when enacted, replace the existing Companies Act, 1956 in its entirety, and “seeks to enable the corporate sector in India to operate in a regulatory environment of best international practices that fosters entrepreneurship, investment, and growth. . .”<sup>81</sup>

#### H. LIMITED LIABILITY PARTNERSHIP BILL, 2008

This bill provides for the formation and regulation of limited liability partnerships (LLP), a corporate form that did not previously exist in India. The government has long recognized the need for LLP legislation in India to provide businesses with a framework

77. Salim Gangadharan, RBI, *Direct Investment by Residents in Joint Venture (JV)/Wholly Owned Subsidiary (WOS) Abroad*, Master Circular No. 1/2008-09, para. A.1 (July 1, 2008).

78. Salim Gangadharan, RBI, *Overseas Investments-Liberalization/Rationalization*, AP (DIR Series) Circular No. 48 (June 3, 2008).

79. *Id.*

80. Press Release No. 202/2008, SEBI, SEBI Board Meeting (Oct. 6, 2008).

81. Press Release, Ministry of Corporate Affairs, The Companies Bill, 2008 (Sept. 29, 2008).

that offers "flexibility suited to requirements of service, knowledge and technology based enterprises."<sup>82</sup> Details regarding the taxation of LLPs have not been announced thus far.

#### I. INTERNATIONAL ARBITRATION FACILITY

The government has approved the establishment in India of a regional facility of the Permanent Court of Arbitration based at The Hague.<sup>83</sup> The regional facility will provide a forum for international arbitrations in India for disputes arising in India and the region.

### XIII. Israel<sup>84</sup>

Many transactions that involve the acquisition of a controlling interest in Israeli corporations are exercised through leveraged buyout, where a considerable percentage of the price of the acquisition is financed by borrowed capital, and the assets of the corporation being acquired are often used as collateral. Following the acquisition, the purchaser repays the borrowed capital by selling part of the assets of the corporation it acquired or by using dividends distributed by the corporation.

On August 20, 2007, the District Court of Haifa, Israel, casted doubts on the legality and validity of a leveraged buyout transaction. In *Yarden v. Liphshitz* (TA 474/04), the Court found a controlling shareholder to be in a prohibited situation of a conflict of interests, because such a shareholder had predetermined both the amounts of dividends to be distributed and the specific dates of the distributions, while having a personal interest in repaying a loan.

The controlling shareholders of the corporation in question offered to sell their shares to the CEO of the corporation (the purchaser). The purchaser then obtained loans from a local bank to finance the acquisition of the offered shares. Following the acquisition, the corporation distributed large amounts of dividends and the purchaser was able to repay the loans.

The board of directors and the shareholders of the corporation had unanimously approved the distributions of dividends. The suit was brought by a minority shareholder of the corporation against the purchaser to invalidate the acquisition of the shares.

Professors Uriel Procaccia and Zohar Goshen provided the court with different opinions with respect to the transaction. Professor Procaccia asserted that the transaction was a use of the resources of the corporation to purchase its own shares. He determined that the transaction could not have been executed without the dividend distributions, and the purchaser was therefore able to purchase the shares without paying anything from his own pocket. Although the dividends were equally distributed to all of the shareholders, Procaccia viewed the distribution as inuring to the sole benefit of the purchaser and concluded that the transaction involved a conflict of interest. Professor Goshen, on the other hand, separated the purchase of the shares from the business activity and operation of the

82. Press Release, Ministry of Corporate Affairs, Limited Liability Partnership Bill, 2008 Introduced in Rajya Sabha (Oct. 21, 2008).

83. Press Release, Press Information Bureau, Host Country Agreement Between Republic of India and the Permanent Court of Arbitration (PCA) for Establishing a Regional Facility of PCA in New Delhi (Sept. 4 2008).

84. Jonathan Achiron, Adv., wrote this section on Israel.



corporation in order to assert that there was no conflict of interest involved. Goshen claimed that the corporation was not a party to the transaction and therefore the dividend distributions were not an integral part of such transaction. Furthermore, Goshen asserted that the dividend distributions did not damage the corporation because the dividends were equally distributed to all of the shareholders. Lastly, the fact that following the distributions the dividends were used to repay a loan did not of itself present a conflict of interest.

The court favored Procaccia's opinion and held that the circumstances of the transaction revealed that the dividend distributions were an integral and substantial part of the transaction. The dividend distributions had been predetermined in such a manner to enable the payment of the offered shares from the dividend distributions. The purchaser in its capacity as a CEO had a personal interest in the specific amounts and dates of the distributions, and that personal interest presented a conflict of interest. Although the dividends were equally distributed to all shareholders, they damaged the corporation because not all of the shareholders benefited from the transaction. Some shareholders might have preferred to leave the dividends in the corporation rather than have them distributed to accommodate the purchaser.

The court further held that by purchasing the shares, the purchaser in its capacity as a CEO exploited a corporate opportunity to benefit himself and thereby breached his fiduciary duty. The CEO knew that he could finance the purchase of the shares by dividends distributions, only because the information regarding the amount of available profits to be distributed had been accessible to him by virtue of his office.

Even though the court stressed that leveraged buyouts are legally accepted common practice, such a fact did not have any bearing on the case at bar. The problem stemmed from the fact that the actions of the purchaser in its capacity as a CEO breached his fiduciary duty and resulted in a conflict of interest.

Under the Israeli Companies Law, 5759-1999, a transaction that involves conflicting interests with respect to a corporate officer is valid if the board of directors and the shareholders of the corporation have approved such a transaction. Even though such approvals had been obtained in the case at bar, the court ruled that since the transaction was not in the best interest of the corporation, neither the board of directors nor the shareholders of the corporation could, by approving the transaction, undo the CEO's breach of fiduciary duty.

The decision of the court in *Yarden* is significantly broad. In a case where a controlling shareholder has an interest in the amount or the specific date of a dividend distribution (which is almost all the cases), the entire transaction might result in a conflict of interests. Even a purchaser who is an unrelated third party (and not necessarily a corporate officer) might end up with conflicting interests-if (i) such a third party is interested in repaying a loans by dividends distribution; and (ii) at the time that the dividends are distributed such third party is a controlling shareholder. Moreover, a corporate officer who buys the shares of the corporation in which he is an officer may be considered to be illegally exploiting corporate opportunity.

It remains to be seen whether the Israel Supreme Court would uphold or reverse the District Court's decision in *Yarden*.

#### XIV. Italy<sup>85</sup>

Commenting on developments in 2009 in the Italian M&A market is not only a challenge, but involves a bit of guesswork. The major M&A transaction in 2008 was Alitalia, where political influences and relationships with trade unions are deeply affecting the deal.

Private equity houses have slowed down their investments (with exceptions in the luxury industry). Besides the consequences of the credit crunch, which are apparent in most leveraged transactions, it could be argued that the future of private equity industry in Italy is connected with its ability to concentrate on small and medium size companies, as these represent the most significant part of the Italian economy. Investors may also play a paramount role in the merger process, which is probably fundamental to allow Italian companies to compete in the global market.

Switching to the legal framework, it appears that the flexibility Italian corporate law now offers is not widely known. This is a circumstance, which deserves emphasis, as in our experience as business lawyers international investors are putting off investing in Italy as they consider the Italian system as inflexible and too complex. Furthermore, the Italian corporate system is moving towards important corporate governance rules that should convince the international investor that investing in Italy is a good choice.

Below are two examples of how the system is being continuously simplified and on the increasing relevance of sound corporate governance rules.

##### A. AN EASIER WAY FOR GENERAL CONTRIBUTION IN AN ITALIAN JOINT STOCK COMPANY

As of September 30, 2008, following the entry into force of Legislative Decree No. 142 of August 4, 2008, some rules for general contribution in an Italian joint stock company (*società per azioni*) have changed. The first part of the Legislative Decree provides for a new paragraph 2343-bis of the Italian Civil Code (the Code), changing a common practice—the estimation of contributions in kind in an Italian joint stock company. According to the new provision, it is no longer required that the court appoint an expert for the estimation of the value of the contributions in kind to the company when they are:

1. Securities listed on the stock exchange market, provided that the evaluation is no higher than the average market price of the last six months; or
2. Other assets or contributions in kind that are contributed to the company at their fair value, provided that either:
  - a. the fair value is obtained by financial statements approved no later than one year before and certified by a public accountant without objection to the relevant assets to be contributed; or
  - b. the fair value is assessed by an expert who needs to be a person with “suitable and demonstrable professionalism,” independent from the contributing party and the contributed company and the valuation must “conform to the principles and criteria usually referred to as the ones according to which the valuation of the assets to be contributed is carried out.”

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85. This section on Italy was authored by Mattia Colonnelli de Gasperis, partner of Lombardi Molinari e Associati and Fabio Alberto Regoli, partner of Jacobacci Sterpi Francetti Regoli & de Haas.

An important topic relates to the enforcement of the new rules on the contribution of a business. Italian law treats a business as a composite asset: article 2555 of the Code defines a business as "an aggregate of property organized by an entrepreneur for the conduct of the enterprise." Hence, should the contribution in kind to an Italian stock joint company refer to a business (or a branch of a business), the valuation of such a business will be carried out by an expert appointed directly by the parties and not by the Court.

The above changes will have practical effects on the choices and behavior of companies' directors. In the past, when it was necessary to start up a new company by way of the contribution of a business, usually the new company was a limited liability company (*società a responsabilità limitata*) because the regulations provided for by the Code for a limited liability company are less strict than those applying to a joint stock company. Indeed, pursuant to article 2465 of the Code, the expert for a company's evaluation is not appointed by the court, but directly by the directors. Sometimes, in order to speed up the transaction, it used to be a common practice to establish a limited liability company and then later to transform such limited liability company into a joint stock company. Under the new rules, the direct appointment of an expert, including by a joint stock company, helps to avoid delays due to technical and administrative reasons, giving the opportunity to choose the legal structure of the company to be contributed without any prejudice arising from procedural aspects.

#### B. DIRECT CRIMINAL LIABILITY OF COMPANIES AND ITS IMPACT ON CORPORATE GOVERNANCE

A legal revolution was introduced in Italy in 2001: for the first time, and against a principle that has endured for centuries,<sup>86</sup> Legislative Decree No. 231 of June 8, 2001 (the Decree 231) came into force, providing that companies which benefit from certain defined criminal activities carried out by their top level employees<sup>87</sup> (and, in certain situations, also mid level employees) are directly criminally liable. Decree 231 sets forth a complex framework of sanctions that entitles the criminal judge to match the sanction to the gravity of the offence and impose fines that will have a material impact on the offending company.

To date, the crimes contemplated by Decree 231 are, inter alia, fraud vis-à-vis the State or other public bodies, bribery, corruption and extortion, false corporate notices, false prospectuses, false auditor reports or notices, fictitious formation of share capital, improper return of contributions to the shareholders, unlawful distributions of profits and reserves, unlawful transactions on shares or quotas, wrongful distribution of the company's assets by its liquidator, operations which adversely affect the company's creditors, wrongful influence on the shareholders' meeting, obstructing the exercise of the supervisory authorities' functions or the ability of shareholders and other corporate bodies to control the company's activity, market manipulation, IT fraud, terrorism and subversion of public order, non-compliance with health and safety at work rules, and money laundering.

86. See *I modelli organizzativi ex d.lgs 231/01* (Business Ethics and Criminality of Institutions), ITALIAN LAWYERS ASS. OF BUSINESS (Carlo Monesi ed., 2005).

87. See FRANCESCO SANTI, *La responsabilità delle società e degli enti*, (2004).

To limit the exposure to criminal liability, each company can (and must if it is a listed company or carries out certain businesses and activities) adopt a framework, based on the carrying out of the assessment of risk, the adoption of codes of conduct and protocols, the appointment of an independent specific controlling body, and the implementation of internal audit mechanisms to ensure that all the rules are duly and constantly checked and, whenever necessary, adapted or changed.

As highlighted above, the adoption by the company of rules to avoid its criminal liability are not mandatory, except for certain categories of companies. Nevertheless, the Milan court, in its decision No 1774/08,<sup>88</sup> has stated that in the event a company is held liable for a crime on the basis of Decree 231, the members of the board of directors (but this can also apply to members of the board of statutory auditors) are directly and personally liable to the company itself for the failure to adopt the rules as suggested by Decree 231. In other words, the directors (who, in this particular case had already been sentenced for their crimes) are liable to the company with respect to any fines paid by it.

## XV. Japan<sup>89</sup>

From Japan's perspective, the year 2008 will be remembered for its dramatic and ironic reversals of fortune in terms of international M&A activity. A few years ago, when Japan was mired in a deep post-bubble banking crisis, it was the swaggering U.S. banks and private equity funds that came to Japan's rescue—buying up securitized bad loans, and pawing through Japan's financial wreckage looking for bargains. But this year, the tables have turned.

### A. GLOBAL ECONOMIC CRISIS TRIGGERS SURGE IN OUTBOUND M&A DEALS

Having weathered the global credit crisis relatively unscathed as compared to their foreign counterparts,<sup>90</sup> and with their purchasing power strengthened by a rising yen, plenty of cash, and little debt on their balance sheets, Japanese companies stepped up their M&A activities abroad in 2008. By November 20, Japanese acquisitions of foreign firms had reached a record 75 billion U.S. dollars (USD) in total deal value equal to 7.18 trillion yen—more than triple what they had spent in all of 2007.<sup>91</sup> By comparison, foreign acquisitions of Japanese companies dropped precipitously to 5.18 billion USD (508.8 billion yen) in the first ten months of the year, a decrease of 81.5 percent from the same period in

88. See IL SOLE 24 ORE, Oct. 22, 2008.

89. This part on Japan was authored by Pamela A. Fuller, J.D., LL.M (Tax Law), a New York-based attorney specializing in U.S. federal and international taxation, and the structuring of cross-border investments. Ms. Fuller formerly served as Senior Attorney Advisor to the Chief Judge of the United States Tax Court in Washington, D.C.

90. Despite the record surge in outbound M&A in 2008, Japan was not completely insulated from the global economic crisis as initially hoped. In November, Japan's Prime Minister Taro Aso outlined a government rescue plan, aimed at recapitalizing banks, suspending mark-to-market accounting rules, and stimulating Japan's economy, which had slipped into a recession. Japan's 2008 economic rescue plan is discussed elsewhere in this volume. See Pamela A. Fuller, *Developments in Japan in International Legal Developments in Review: 2008, Finance-International Securities and Capital Markets*, 43 INT'L LAW. 367, 402 (2009).

91. Thomson Reuters market research, Nov. 2008; Mohammed Hadi, *Japan's Acquisitive Mood*, Heard on the Street, WALL ST. J., Nov. 20, 2008.

2007.<sup>92</sup> The value of Japanese firms' foreign acquisitions in 2008 marks the second-highest yearly total ever, behind only that of 2006, which totaled 8.6 trillion yen. By late August, Japan had even surpassed China as being the biggest acquirer of foreign firms in the Asia-Pacific region.<sup>93</sup>

The surge in outbound M&A by Japanese companies in 2008 has been fueled by a multitude of factors, including a dramatic drop in competition from their U.S. and European rivals, which remain far more exposed to the collapse of the U.S. subprime mortgage crisis; the concomitant drop in foreign companies' stock prices; the rising value and purchasing power of the Japanese yen; and the fact that after a decade of paying down debt and hoarding cash in an effort to climb out Japan's deep recession, listed domestic firms now have huge cash reserves,<sup>94</sup> while many western companies are depleted of cash and desperate for credit. Moreover, many Japanese companies are being pressured to gain a better footing in foreign markets, as Japan's birthrate is declining, its domestic markets are contracting, and activist shareholders are pushing Japanese firms to put their mounds of cash to work. Outbound M&A activity was up across the board, ranging from the pharmaceutical and technology sectors, to the steel and car industries, to power utilities, to food and beverage industries, as well as to the troubled banking and insurance sectors.

## B. FINANCIAL SERVICES

As the worldwide credit crisis drove many Wall Street financial institutions into bankruptcies and government bailouts, Japanese banks reemerged on the international stage, moving with uncharacteristic speed to snap up major franchises and prized assets in the United States and Europe, and reshaping, almost overnight, the global financial landscape to their advantage.<sup>95</sup> Early in the year, Mizuho Financial Group, Inc., a holding company of Japan's second largest bank, kicked off the buying spree by spending \$1.2 billion for a

92. See *As Foreign Rivals Retreat in Crisis, Japan Firms Mount M&A Blitz*, NIKKEI WEEKLY, Nov. 17, 2008. Ironically, while cash-rich Japanese companies began capitalizing on their western rivals' financial tribulations by gobbling up foreign companies, record numbers of Japanese firms rushed to institute poison pills and other defenses fearing a sudden surge in hostile foreign takeovers. The anxiety was triggered by uncertainty over the possible effects of Japan's recent legalization of inbound, cross-border triangular mergers, which the U.S. financial giant Citigroup, Inc., was the first to utilize in January 2008 when it acquired Nikko Cordial Corporation. Urging restraint, Japan's government issued newly revised Takeover Defense Guidelines incorporating, to a remarkable degree, American takeover jurisprudence. For a discussion of the triangular merger provision, see another article in this volume, Pamela A. Fuller, *International Legal Developments in Review: 2008, Taxation-Japan*, 43 INT'L LAW. 759, 766 (2009). For a discussion of the rush to institute poison pills, and new ministry sponsored Takeover Defense Guidelines, see Pamela A. Fuller, *Fearing Foreign Takeovers, Japanese Firms Fortify Their Defenses in International Legal Developments in Review: 2008, Regional and Cooperative Law-Asia and Pacific Law-Japan*, 43 INT'L LAW. 1007, 1019 (2009).

93. See *Boom No. 3 for Outbound M&As*, NIKKEI WEEKLY, Sept. 22, 2008.

94. At the close of the fiscal year ended March 31, 2008, Japanese listed firms reported cash reserves totaling 60 trillion yen. See *id.*

95. The recent international acquisitions by Japan's banks have been motivated by several factors. As many Japanese firms have turned to the capital markets for funding, the opportunities for banking growth have dwindled in the Japanese market. Moreover, because many of the clients of Japanese banks have gone global, the banks have increasingly felt threatened by competition from abroad. For example, three years ago, Lehman Brothers overtook Nomura as the top broker on the Tokyo Stock Exchange in trading volume, and held that position until this year. See Bank of Japan, Financial System Report-Supplement (Sept. 2008), available at [www.boj.or.jp/en/type/ronbun/fsr/data/fsr08b.pdf](http://www.boj.or.jp/en/type/ronbun/fsr/data/fsr08b.pdf).

stake in the U.S. bank Merrill Lynch, which was later acquired by Bank of America. Meanwhile, Tokio Marine Holding Corporation acquired the U.S.-based insurance group, Philadelphia Consolidated Holding Company, for 4.7 billion USD. In July, Sumitomo Mitsui Financial Group (SMFG) paid approximately 1 billion USD for a stake in Barclay's Bank—the U.K. institution that acquired the core North American businesses of failed U.S. bank Lehman Brothers. In October, Japan's largest and most conservative bank, Mitsubishi UFJ Financial Group (MUFG), cut short its due diligence procedures, taking less than a week to come up with the funds to purchase a leading twenty-one percent stake in U.S. banking giant, Morgan Stanley, for approximately 8.5 billion USD, equal to approximately eleven percent of the value its shareholders' equity. MUFG also turned another U.S. bank, UnionBanCal, into its wholly owned subsidiary, following a successful tender offer.<sup>96</sup>

But the most sensational international triumph for Japan's insular financial services sector occurred in the third week of September, when Nomura Holdings, Inc., the holding company of Japan's leading brokerage house, Nomura Securities, won the competition to buy the highly prized Asian, European, and Middle Eastern operations of the bankrupt U.S. investment bank, Lehman Brothers Holdings, Inc., at the bargain price of 227 million USD. The price tag is only about 1/30th of what it might have paid last year when Lehman Brothers was viewed as 20 billion U.S.-dollar company.<sup>97</sup> The primary asset Nomura purchased was an army of very experienced bankers—approximately 8,000 employees—who most commentators agree are far more skilled in M&A advisory services than Nomura's own employees.<sup>98</sup> In 2007, Thomson Reuters ranked Nomura 51st in European M&A advisory deals by value. But, with credit for Lehman's ongoing deals, Nomura will place tenth in Europe and fifth in Asia. Particularly gratifying for Nomura, was that it was chosen as Lehman's successor over its faster-growing Asian rival banks in China and India, which have loan problems of their own.

The uncharacteristically bold moves by Japan's financial institutions raise a myriad of uncertainties. The first question is whether the acquisitions will prove to be a smart move in light of evidence that the highly leveraged business models of the western investment banks they purchased may be obsolete, and their profitability greatly diminished for the near, if not foreseeable, future. By late November, it was clear that the Japanese acquiring banks were also in financial trouble, prompting critics to charge that their overseas expansion strategies were blunders.<sup>99</sup> Some analysts contend Japan's banks are merely deep

96. See *id.* See also *Japanese Megabanks Finding Opportunity in Subprime Mess*, NIKKEI WEEKLY, Aug. 13, 2008; *Japan Banks Emerge as Global Loan Providers Amid Credit Crunch*, NIKKEI, Aug. 13, 2008.

97. On Sept. 22, 2008, Nomura Holdings, Inc. (Nomura) announced that it had agreed to acquire Lehman Brothers' franchise operations in the Asia Pacific region, including all employees. The following day, Nomura announced it had agreed to acquire the European and Middle Eastern equity and investment banking operations of Lehman Brothers. See Bank of Japan, Financial System Report—Supplement, *supra* note 95.

98. Approximately 2,500 of the former Lehman Brothers employees are joining Nomura's European investment banking division, which already has 1,900 employees. Before declaring bankruptcy, Lehman Brothers had approximately 200 European deals in the works—several times more than Nomura. See *Nomura Continues Global Quest as 'Last Investment Bank'*, NIKKEI WEEKLY, Oct. 24, 2008.

99. Japan's three largest banks, MUFG, SMFG, and Mizuho made plans to shore up their own capital adequacy ratios, which dropped as the value of their shares plummeted. In addition, all the acquirers lined up for a possible capital infusion announced by Japan's government as part of its economic stimulus package. See *Blunders Send Megabanks Scrambling for Capital*, NIKKEI WEEKLY, Nov. 20, 2008.

pockets—a ready source of cash—and lack the necessary sophistication, the expertise, the competitive drive, and possibly the greed, to truly replace Wall Street as the world's leading bankers and deal makers. On the other hand, it is unlikely that western banks will be willing to conform to Japan's banking model which, historically, has been more reserved, comparatively opaque, and which has valued consensus over competition, insiders over outsiders, and long-term vision over short-term profits.

The second critical question is whether Japan's banks can absorb, and benefit from the western banking expertise of the companies they have acquired. The key to Nomura's success will hinge on whether it can retain the talented Lehman bankers, and the positive aspects of their culture. In Europe and Asia, Nomura faces the challenging task of integrating into their own ranks the army of talented local bankers and brokers who may, at the first opportunity, be tempted to leave if (or when) faced with traditional glass ceilings for foreigners, and Japan's lock-step system that historically favors seniority over performance.

In an attempt to keep top local talent in its new Asian, Middle Eastern, and European units, Nomura announced in October that it would provide generous retention bonuses, and introduce western elements to its corporate governance system in order to open the door for promotions of top ex-Lehman employees.<sup>100</sup> Traditionally, Japanese companies have had very large boards by western standards, comprised of senior officers who have risen through the ranks of the firm.<sup>101</sup> The so-called "corporate officer system," which Nomura promises to implement, represents somewhat of a compromise between the Japanese model and the Anglo-American ideal in that it has a much smaller board of directors, which provides broader managerial oversight, and specially appointed officers who run their divisions more independently of the board than in a traditional Japanese company. Independent directors and auditors are not required under the corporate officer system.<sup>102</sup>

100. In November, Nomura appointed two ex-Lehman employees to head up its equity operations in the Asia-Pacific region, as well as in Europe, the Middle East, and Africa. See *Nomura Working to Integrate Former Lehman Employees*, NIKKEI WEEKLY, Oct. 25, 2008.

101. In a prototypical Japanese firm, the officers and directors are virtually the same people; there are no truly independent directors, and even the auditors are insiders, ostensibly governed by statute. The 2005 Companies Law introduced an optional U.S.-style, committee system of corporate governance, requiring independent directors, and relieving firms of the burdensome statutory auditor system. So far, only a few Japanese companies, including Sony Corp., have adopted this system, which attempts to place an organizational firewall between the officers and directors. See *Kaisha ho* [2005 Companies Law], Law No. 86 of 2005. For an overview of the 2005 Companies Law, see Pamela A. Fuller, *Asia and Pacific Law—Japan*, 40 INT'L LAW. 515, 515-23 (2006); see Pamela Ann Fuller, *Mergers and Acquisitions*, 40 INT'L LAW. 311, 327-28 (2006).

102. Japan's new Financial Instruments and Exchange Law, the provisions of which took effect between 2006 and 2008, imposes more stringent disclosure and reporting requirements than what was previously required. See *Kinyu shohin torihikiho* [Financial Instruments and Exchange Law], Law No. 25 of 1948, as amended by Law No. 65 and Law No. 66 of 2006. [hereinafter FIEL]. An English summary of the 2008 bill amending the FIEL—most provisions of which were passed into law—is available on the Financial Service Agency's website: <http://www.fsa.go.jp/en/news/2007/20071221.html>. An English translation of the FIEL is available on the Financial Services Agency's website at: <http://www.fsa.go.jp/common/law/fie01.pdf>. For example, the FIEL requires all public companies and their affiliates listed on Japanese stock exchanges to file quarterly reports with the Ministry of Finance, including thorough "internal control reports" substantiating the validity of their financial reporting. FIEL, arts. 24-4-4, 24-4-2, 24-4-8, 193-2. The new reporting system is effective for fiscal years beginning on or after April 1, 2008. Other onerous disclosure provisions of the FIEL took effect on Sept. 30, 2007, requiring banks, securities firms, and insurance companies that market financial products to thoroughly explain to their non-institutional investors the inherent risks of the products,

## XVI. The Netherlands<sup>103</sup>

### A. IMPLEMENTATION OF CROSS BORDER MERGER DIRECTIVE

On July 15, 2008, the Netherlands completed the implementation of the Tenth E.U. Directive on Cross Border Mergers (the Directive).<sup>104</sup> To foster cross-border business activity in the European Union and a market for corporate governance, the Directive requires member states to provide for statutory mergers with business organizations from other member states. As a result of its implementation, Dutch law enables Dutch companies to enter into a merger with entities which have their corporate seat in another Member State.<sup>105</sup> The implementation of the Directive places a substantial focus on the protection of minority shareholders.<sup>106</sup> As permitted under the Directive, the Dutch implementation grants minority shareholders an appraisal right if such shareholders voted against the merger proposal.<sup>107</sup>

### B. CREDIT CRUNCH

The credit crunch had dramatic effects on the 2007 acquisition of ABN AMRO Bank by a consortium of RBS, Santander, and Fortis. Fortis was in the process of integrating its part of ABN AMRO Bank into its activities when it got into financial difficulty and experienced a drop in its share level to the lowest level since 1995. Despite the Dutch government taking action to temporarily forbid naked short selling,<sup>108</sup> Fortis' situation deteriorated. At the end of September, the governments of Belgium, Luxembourg, and the Netherlands agreed to make a joint capital injection into the bank. After having little effect on Fortis' rapidly deteriorating financial situation, the Dutch government acquired the Dutch part of Fortis' activities, including the bank's stake in ABN AMRO's retail

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including the associated fees. See *Financial Services Agency, Japan, New Legislative Framework for Investor Protection—The Financial Instruments and Exchange Law 3* (Oct. 2006), available at [www.fsa.go.jp/en/policy/fiel/20061010.pdf](http://www.fsa.go.jp/en/policy/fiel/20061010.pdf). For a discussion of the FIEL, see Pamela A. Fuller, *International Investment and Development Committee*, 42 INT'L LAW. 511, 518-23, (2008). Important amendments were made to the FIEL in June 2008. For an overview of those 2008 amendments, see another article in this volume, Pamela A. Fuller, *International Securities and Capital Markets*, 43 INT'L LAW. 613 (2009).

103. This section on the Netherlands was written by Ton Schutte, Christopher King and Nancy A. Matos. Ton Schutte is a partner at DeBrauw Blackstone Westbroek in New York, Christopher King is general counsel at Hunter Douglas, and Nancy A. Matos is an associate at Baker & McKenzie in Amsterdam.

104. Directive 2005/56/EG of the E.U. Parliament and of the Council of October 26, 2005. For more background information on the Directive: Arianna Ugliano, *The New Cross-Border Merger Directive: Harmonisation of European Company Law and Free Movement*, 18 EUROPEAN BUS. L. REV. 2007-3, 585-617. Location in the Netherlands: Law of June 27, 2008, Bulletin of Acts and Decrees, number 260, now to be found in the articles 2:333b et seq. of the Dutch Civil Code.

105. Before this act came into effect, there already existed Dutch case law that made a cross border merger possible. See *Chamber of Commerce of Amsterdam/Inspire Art Ltd, Arrondissementsrechtbank [Rb.]* [ordinary court of first instance and court of appeal to the Kantongerecht], Amsterdam, September 30, 2003, ECR I-10155 (Neth.).

106. L. Timmerman & A. Doorman, *Rights of minority shareholders in the Netherlands*, Report for the XVIth Congress of the Int'l Acad. of Comparative Law (2002).

107. Article 2:333h Dutch Civil Code. The appraisal right under Article 2:333h of the Dutch Civil Code is only available to minority shareholders of a Dutch disappearing entity.

108. Netherlands Authority for the Financial Markets (AFM), *Temporary Regulation on Short Selling*, Stcrt. [Netherlands Government Gazette], Oct. 10, 2008, nr. 197 / page 2.



activities at a cost of EUR 16.8 billion.<sup>109</sup> At present, it is not clear what will happen to the retail ABN AMRO Bank and the Dutch part of Fortis, which are now operating as independent state-owned banks. The Dutch government now plans to integrate the two banks in the course of 2009 and privatize the combined bank in 2010, whereby it is unclear how the investigation on state aid commenced by the European Commission will affect the integration and sales process. The Dutch government's intention is to retain both banks until current market conditions settle, as the Dutch government has no interest in operating a state bank in the long term.

### C. A DUTCH TAKEOVER PANEL

On September 8, 2008, the Ministry of Finance made available a consultation document to test if the Dutch market parties wish to institute a Takeover Panel in the Netherlands.<sup>110</sup> Some say that complicated M&A processes cannot be properly supervised by the Financial Markets Authority and the courts and, therefore, that The Netherlands needs a "market supervisor" that functions as an "honest broker."

The Dutch legislator is not in favor of copying the British Takeover Panel model and takes the view that a number of safeguards in (hostile) takeover situations are already built into Dutch law as a consequence of the implementation of the Cross Border Directive in the Financial Markets Supervision Act and the Public Takeover Bids Decree.<sup>111</sup> Following the implementation of the Directive, the supervisory powers of the Financial Markets Authority have been strengthened. One of the Ministry of Finance's suggestions is to introduce a rule similar to the "put up or shut up" rule from the British Code, in order to prevent burdensome and long takeover fights.<sup>112</sup> The consultation process will close on December 1, 2008.

### D. INSIDER LISTS/SQUEEZE-OUTS

In 2007, Numico and Danone negotiated an acquisition in the form of a public bid by Danone. According to the Financial Markets Supervision Act, price sensitive information (such as M&A negotiations) must be disclosed forthwith, unless, inter alia, the company has taken action to ensure restricted access to this information.<sup>113</sup> Companies are required to maintain a list of insiders.<sup>114</sup> Numico's insider list appeared to be incomplete, causing the Financial Markets Authority to impose a penalty. In a recent court case, the decision of the Financial Markets Authority was upheld, inter alia, on the basis that the list was indeed incomplete and therefore price sensitive information was not sufficiently pro-

109. *Netherlands economy: Under pressure*, ECONOMIST INTELLIGENCE UNIT, VIEWS WIRE, (Nov. 4, 2008), available at [http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article\\_id=923930877&region\\_id=&country\\_id=1400000140&channel\\_id=190004019&category\\_id=500004050&refm=vwCat&page\\_title=Article&rf=0](http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article_id=923930877&region_id=&country_id=1400000140&channel_id=190004019&category_id=500004050&refm=vwCat&page_title=Article&rf=0). Furthermore, parts of Fortis were bought by the French BNP Paribas. The publicly traded Fortis has only insurance and no banking activities.

110. Consultation document 'Marktmeester', available at [www.minfin.nl](http://www.minfin.nl).

111. The Bulletin of Acts and Decrees no. 329 (Oct. 28, 2007).

112. Consultation document 'Marktmeester', *supra* note 110 at 25.

113. Article 5:59 section 1 Financial Markets Supervision Act and article 14 section 2 Market Abuse Decree.

114. Article 5:59 section 7 Financial Markets Supervision Act.

tected.<sup>115</sup> This decision emphasizes the need to comply with specific Dutch securities rules and regulations when considering a transaction in relation to a Dutch entity.

On October 28, 2008, the Enterprise Chamber of the Amsterdam Court of Appeals ruled that minority shares held in Numico B.V. (previously known as Koninklijke Numico N.V.) were to be transferred to Group Danone S.A. at a price of EUR 55 per share—the initial bid price that Group Danone S.A. made during its 2007 takeover bid.<sup>116</sup> This is a first of its kind ruling by the Enterprise Chamber on the interpretation of the recently codified supplemental squeeze-out rights afforded to majority shareholders who have made a takeover bid in the Netherlands.<sup>117</sup> At issue was whether the initial bid price made in 2007 was a fair squeeze-out price. According to the Dutch Civil Code, if the bidder acquired at least ninety percent of the shares in respect of which the offer was made, the bid price is deemed fair.<sup>118</sup> The court held that the mere fact that the ninety percent threshold was not met does not preclude the court from determining that the initial offer price is a fair squeeze-out price.

#### E. SEVERANCE PAYMENTS

The level of severance payments can be important in Dutch M&A practice, particularly in difficult economic times. One strategic reason for a sale by some industrial sellers is not to have to perform a necessary restructuring that could have negative effects on employee relations throughout the company. Sometimes, this opens an opportunity for private equity or (typically smaller) industry buyers, who do not have such problems and are willing to price a restructuring, sometimes even a pre-agreed restructuring, into their bid. The Dutch Circle of Subdistrict Court Judges (Kring van Kantonrechters) has announced that as of January 2009, the formula for the calculation of severance payments will change. One of the most important changes is the increased weight attributed to the likelihood of an employee getting other employment. Although the thinking behind the change was principally to make it cheaper to lay off employees in the tight labor market in the Netherlands for many technical workers, the credit crisis and its negative effect on the real economy may have the opposite effect and make layoffs generally more costly.

### XVII. New Zealand<sup>119</sup>

#### A. TAKE OVERS

##### 1. *New Rule Against Misleading or Deceptive Conduct*

A new Takeovers Code rule, Rule 64, which prohibits misleading or deceptive conduct in relation to Code-regulated transactions, came into force on February 29, 2008. Under

115. Danone Baby & Med. Nutrition B.V./Fin. Mkts. Authority, Arrondissementsrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht], Rotterdam, Sept. 3, 2008, LJN: BF11JS (Neth.).

116. Groupe Danone S.A., et al, Gerechtshof [Hof] [ordinary court of appeal], Amsterdam, Oct. 28, 2008, LJN: BG3438 (Neth.).

117. Article 2:359c Dutch Civil Code.

118. Article 2:359c section 6 Dutch Civil Code.

119. David Quigg, Quigg Partners, Wellington, New Zealand authored this section.

Rule 64, the Takeovers Panel may exercise its enforcement powers for any misleading or deceptive conduct (or conduct that is likely to mislead or deceive) by any person:

- in relation to any transaction or event that is regulated by the Code; or
- incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code.

The Rule extends to any person who engages in the above conduct – not just bidders, target companies, or major shareholders.

New sections 44B to 44E of the Takeovers Act (which also relate to misleading conduct) came into force on the same date. New section 44C of the Takeovers Act makes it a criminal offence to make or disseminate materially false or misleading statements or information relating to Code-regulated transactions or events. The penalties for this offence are, for an individual, imprisonment for up to five years or a fine of up to \$300,000, or both. For a body corporate, a fine of up to \$1 million can be imposed.

What is 'misleading or deceptive' conduct? The phrase appears in both the New Fair Trading Act 1986 and the Securities Markets Act 1988, and in various pieces of Australian legislation. It therefore has a history of judicial interpretation, which the Panel intends to follow. The Panel has stated that the words "will be given their natural and ordinary meaning of 'to lead into error.'"

The practical effect of the new provisions means that participants in the New Zealand market should take particular care when making any representations to other parties to the transaction, to the media, or to the market. The Panel has indicated that it "will respond in an appropriate manner to protect the interests of the market."

In particular, the Panel has indicated that it will enforce "last and final" statements as to price or period, or an intention not to accept an offer, for example, as promises, and will seek to enforce them as such. They have stated "any later inconsistent action or statement risks breaching Rule 6.4. . . . False [T]he integrity of the market requires that statements made in relation to Takeovers can be relied on." It is however possible to qualify such statements, by "reserving the right" to alter their stated position, for example.

## 2. *Takeovers Panel Intervention in 'Lock-Up' Agreement*

From a press release by Mr. Chips Holdings Limited, the market was made aware that the Takeovers Panel was not comfortable with a "lock-up" that included a provision that, if the transaction was structured requiring a shareholder vote (i.e. scheme/amalgamation), the shareholder agreed to give a commitment to vote positively for the restructured transaction. The parties agreed to remove the provision from the lock-up.

## 3. *Overseas Investment Approval*

Under certain circumstances international acquisitions may require consent from the New Zealand Overseas Investment Office where there is a New Zealand business operated by the "target." This can have an impact on the timing of the transaction.

The consent process under the Overseas Investment Act had been seen as somewhat of a 'rubber stamp' process. However, a decision in April this year called such a view into question, when the New Zealand Government, via the Associate Minister of Finance and

Minister of Land Information, declined approval for the Canadian Pension Plan Investment Board to acquire a forty percent shareholding in Auckland International Airport.

The Overseas Investment Office had considered that the test for approval under the Act had been satisfied, but the Ministers disagreed because the proposed investment did not satisfy the requirement that it would, or would be likely to, benefit New Zealand.

The decision to decline the application highlighted the political nature of the Act in New Zealand, where some see overseas investment in land and assets as "selling off the family silver." The Auckland Airport decision was, however, made under the Labour government that was voted out of government on November 8th. The incoming National government is likely to be much more receptive to such international investment. The Auckland Airport decision may, therefore, stand as an aberration and not have any practical effect on overseas investment in New Zealand.

## B. COMPETITION/ANTI-TRUST IN NEW ZEALAND M&A

There have been several high-profile competition/antitrust cases in New Zealand in 2008.

### 1. *NZ Bus Case*

The Court of Appeal largely upheld the High Court decision in *Commerce Commission v. New Zealand Bus. Ltd.*, finding an acquisition would substantially lessen competition in the Wellington subsidized bus services market. The Court of Appeal overturned the High Court ruling that certain vendor shareholders had contravened the accessory liability provisions in the Act. There were different approaches by different judges to the issues of accessory liability but the outcome was unanimous. The Commerce Commission sought leave to appeal the decision on this point to the Supreme Court, but such leave was declined.

### 2. *The Warehouse Case*

In 2007 the Commerce Commission declined two applications from rival supermarket groups, Foodstuffs and Woolworths, who had each sought clearance to acquire up to 100 percent of The Warehouse Group Limited. At that time, The Warehouse Group Limited had begun to expand its extensive general merchandise operations by opening several 'Warehouse Extra' stores that included supermarket operations. The Commission declined to grant clearance to either acquisition, on the basis that it was not satisfied that either of the proposed acquisitions would not have, or would not be likely to have, the effect of substantially lessening competition in relevant markets. The Commission had concerns about the grocery market, where there was essentially a duopoly, except for those regions where the Warehouse had opened its 'Extra' stores. The Commission felt that they could not evaluate the likely success or otherwise of the 'Extra' concept, but that with the significant barriers to entry in the supermarket sector, The Warehouse was one of the only current New Zealand entities with the chance to break into the market.

**XVIII. Poland<sup>120</sup>****A. COMMERCIAL COMPANY CODE**

In 2008, several important changes in the Act of September 15, 2000 Commercial Company Code (the CCC) took effect.<sup>121</sup> By implementing the Tenth EC Directive,<sup>122</sup> the Act of April 25, 2008 on the Change of the Commercial Company Code<sup>123</sup> permitted the merger of Polish law capital companies as well as limited joint-stock partnerships with international companies established based on the laws of the Member States or countries being parties to the treaty on European Economic Area (cross-border merger). According to new provisions of the CCC, subject to certain exceptions, cross-border mergers are governed by the same regulations as those applying to domestic companies. Limited joint-stock partnerships cannot act as an acquiring company nor can a newly formed company. According to new regulations, a newly formed company established by a cross-border merger shall be governed by the law applicable to its new registered seat. A merger plan as well as a report of the management board of the merging companies, as part of a cross-border merger, should contain more information than in the case of the merger of domestic companies. Furthermore, the provisions afford more protection of employees' rights as regards to information and consultation on issues regarding cross-border merger of companies.

The Act of April 25, 2008 on the Change of the Commercial Company Code<sup>124</sup> shortened the time required to merge domestic companies (domestic mergers). Following the effective date of the changes to the CCC, shareholders no longer have to obtain a notice of the general meeting of shareholders six weeks in advance. Based on new regulations, the first notice shall be served on shareholders at least one month before the shareholders' meeting, while the second no later than two weeks before. The merger plan must be published a month before the shareholders' meeting, at the latest. This shortens the time for a merger procedure by approximately one month.

Other changes of the CCC follow from the provisions of the Act of June 13, 2008 on Change of the Commercial Company Code,<sup>125</sup> which implemented the Second EC Directive<sup>126</sup> into Polish law. The amendment has waived the obligation to audit the certain types of in-kind contributions during the company formation or increasing the share capital. Nevertheless, the company's management board shall have the in-kind contributions audited if their value could have changed due to extraordinary circumstances related to the

120. This section on Poland was authored by C. David DeBenedetti, New York attorney and partner at DeBenedetti, Majewski Szczesniak Law Firm in Warsaw (Poland), and Jakub Pitera, a Polish legal advisor and senior associate at DeBenedetti, Majewski Szczesniak Law Firm in Warsaw (Poland).

121. Journal of Laws of 2000 No. 94, item 1037 as amended.

122. Directive 2005/56/EC of the EU Parliament and the Council of October 26, 2005 on cross-border mergers of limited liability.

123. Journal of Laws of 2008 No. 86, item 524.

124. *Id.*

125. Journal of Laws of 2008 No. 118, item 747.

126. "Second Council Directive 77/91/EEC of December 13, 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent" as amended by Directive 2006/68/EC of September 6, 2006.

loss of liquidity of traded securities or monetary market instruments or any new circumstances that took place when making the contribution in-kind. Moreover, shareholders representing at least twenty percent of the share capital have the right to demand from the management board to have the said assets assessed by an auditor.

Another important change of the CCC provides for the possibility of directly or indirectly financing by the company the acquisition or takeover of its shares from its own funds. The funds to finance the takeover or acquisition of shares should be derived from net profit and form part of the company's reserve capital. The requirements also involve adopting a resolution by the shareholders' meeting as well as a report of the management board. A loan, an advance payment or collateral may be used as a source of financing in accordance with market terms and conditions, in particular as regards the interest rate due to the company as well as collateral established to the benefit of the company. A company may finance the acquisition or takeover exclusively upon examining the debtor's solvency.

Moreover, the amendments resulting from the Act of June 13, 2008 on Change of the Commercial Company Code<sup>127</sup> made the buy-back procedure more liberal. According to new regulations, any company can acquire its own shares, and the time when the company may lawfully hold its own shares has been extended to five years. However, resolution of the shareholders' meeting is still required.

Pursuant to the Act of June 13, 2008 on Change of the Commercial Company Code<sup>128</sup> while decreasing the company's share capital, only creditors, whose claims are due and payable, can seek that their claims be satisfied by the company. Creditors, whose claims are not due and payable, can demand that their claims be secured (by placing them with the court deposit) if the said creditors can justify that the satisfaction of the said claims is threatened through decreasing the share capital, and that the company has failed to pay the outstanding amounts due to them.

## **XIX. Portugal<sup>129</sup>**

The international turmoil in the financial markets has left its mark on the Portuguese market. The overall local scenario was depressed and high profile M&A activity was reduced. As an example, there was a single initial public offering, with a disappointing after market.

Apart from the nationalization of a local credit institution (Banco Português de Negócios), which appears to have been brought about mostly due to director fraud but may have been accelerated by the financial turmoil, no relevant insolvencies or individual rescues have occurred due to the financial crisis.

There are, however, some relevant expectations of a slight M&A activity pickup because of the financial crisis and subsequent general economic crisis.

Due to the close interconnection between the Portuguese and Spanish economies, insolvencies or pre-insolvencies of major Spanish players, especially construction companies, may result in a need for these companies to divest their local Portuguese subsidiaries.

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127. Journal of Laws of 2008 No. 118, item 747.

128. *Id.*

129. Diogo Leónidas Rocha, Bruno Ferreira, and Tomás Pereira da Silva authored this section on Portugal.

Furthermore, some consolidation or divestment involving credit institutions is also expected, mostly due to the need to comply with capital requirements.

On a different note, public investments are also expected to serve as a driving force for economic recovery, especially in relation to the two main public infrastructure investments: the new Lisbon international airport and the high-speed train links.

#### A. LOCAL RESPONSES TO THE FINANCIAL CRISIS

Both the Portuguese government and the Portuguese Securities Commission (CMVM) have approved legislation in order to complement and intensify the international efforts to control the financial crisis. These regulatory measures appear to be the beginning of an intense supervisory activity that may change the current balance between the financial markets and the financial regulation.

#### B. GRANTING OF STATE GUARANTEES FOR INTER-BANK LENDING

On October 24, 2008, Law no. 60-A/2008 was approved, which established the framework for the granting of personal guarantees by the Portuguese state in favor of credit institutions having their head office in Portugal for the purposes of inter-bank financing and refinancing up to the amount of €20 billion.

Should the guarantees be enforced, the Portuguese state is entitled to: (i) convert the credit over the credit institution into share capital, notably through the issuance of preferred shares; (ii) decide the adoption of principles of corporate governance, establish dividend distribution policies and director, officer and other corporate body remuneration policies; and (iii) appoint one or more interim directors.

#### C. LIMITATION ON SHORT SELLING

The CMVM approved certain regulatory measures that constrain or limit short selling activities. In addition to regulations pursuant to which short selling transactions must be disclosed by market members to the CMVM, this regulatory authority has also approved Instruction no. 2/2008, of September 22, 2008, which prohibited short selling transactions over the securities of certain financial institutions listed in the Portuguese market. Furthermore, the CMVM approved the Instruction no. 4/2008 on September 22, 2008, under which investors must disclose uncovered short positions in securities.

The following transactions or instruments are deemed to create an uncovered short position: (i) utilized loans relating to shares and securities that give the right to their subscription, acquisition, or conversion; (ii) derivatives dealt in markets; and (iii) OTC derivatives, particularly, swaps.

The adoption of this instruction is the result of the exchange of information between supervisory authorities within the context of the Committee of European Securities Regulators (CESR), considering the current market instability and the need for regulatory intervention.

D. TEMPORARY INCREASE OF THE MINIMUM DEPOSIT GUARANTEE AND  
REINFORCEMENT OF INFORMATION AND TRANSPARENCY IN THE  
FINANCIAL SYSTEM

On November 3, 2008, the Portuguese government approved Decree-law no. 211-A/2008, which reinforces disclosure and transparency duties in the financial system and temporarily increased the minimum deposit guarantee by the Portuguese Deposit Guarantee Fund. The minimum deposit guarantee by the Deposit Guarantee Fund was temporarily increased from €25,000.00 to €100,000.00. Moreover, the reimbursement term was considerably reduced to seven days for deposits up to €10,000.00 and one month for deposits up to €100,000.00.

With specific relevance for the M&A activity, shareholding disclosure obligations were imposed on listed companies and financial intermediaries in relation to the acquisition of qualifying holdings that they acquire in companies having their head office outside the European Union.

From a supervisory point of view, the CMVM was granted additional supervisory powers in order to enable it to enforce compliance with certain financial information disclosure obligations.

## XX. South Africa<sup>130</sup>

On September 21, 2008, a day after accepting a call by the governing African National Congress (ANC) to quit and in contrast to the precedent in many other African countries, Mr. Thabo Mbeki resigned as the president of South Africa.<sup>131</sup> Mr. Kgalema Motlanthe, the deputy leader of the ANC, was sworn in as South Africa's new president pending presidential elections in 2009.

The International Monetary Fund released its Financial System Stability Assessment on South Africa.<sup>132</sup> The joint IMF-World Bank Financial Assessment Programme (FSAP) mission's main findings were, inter alia, that: South Africa's sophisticated financial system was financially sound; banks and insurance companies have enjoyed good profitability, capitalization levels and reserves; the financial sector's regulatory framework is modern and generally effective; and stress tests suggest that capital and reserve cushions at banks and insurance companies are sufficient to absorb large shocks. The IMF also published its regional economic outlook for Sub-Saharan Africa (2008).<sup>133</sup> Sub-Saharan African growth is expected to slow to about six percent in 2008 and 2009, down from 6.5% in 2007. Meanwhile, inflation is projected to increase to twelve percent in 2008 and ten percent in

130. This section on South Africa was authored by J Michael Judin of Attorneys Goldman Judin Inc. of Johannesburg and Advocate Dirk Richard Van Zyl of the Sandton Bar, South Africa.

131. *South Africa (sic) president steps down*, BBC, Sept. 21, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7627957.stm>.

132. IMF Country Report No. 08/349, International Monetary Fund, Oct. 2008, available at [www.imf.org/external/pubs/ft/scr/2008/cr08349.pdf](http://www.imf.org/external/pubs/ft/scr/2008/cr08349.pdf).

133. Regional Economic Outlook: Saharan Africa, International Monetary Fund, Oct. 2008, ISPN 978-1-58906-763-9, available at <http://www.imf.org/external/pubs/ft/reo/2008/afr/eng/sreo1008.htm>.



2009. Africa's share in Global Foreign Direct Investment remained at about three percent during the period 2007 and 2008,<sup>134</sup> but is sure to diminish in 2009.

The South African Department of Trade & Industry invited comments<sup>135</sup> to proposed new determinations for merger thresholds for purposes of determining categories of mergers.<sup>136</sup> Employment, affirmative action, and social equity considerations continue to play a role in adjudicating a case on a merger under South African Competition Law.<sup>137</sup>

The Housing Development Agencies Act<sup>138</sup> was adopted to establish an agency that would acquire, hold, develop, and lease land for residential and community purposes and create sustainable human settlement.<sup>139</sup> This Act has implications for the mortgage and home building industry.<sup>140</sup>

The New Companies Bill<sup>141</sup> has been finalized and is due to be tabled in the South African parliament for adoption during 2009. Following in its wake, the King Committee on Corporate Governance is to launch the King Report on Corporate Governance for South Africa (King III Report).

Development and preparation for the 2010 FIFA World Cup™ continues at a frenetic pace with the president of the organizing committee stating, perhaps wishfully, that the world economic crisis will only have a "limited impact" on preparations for the 2010 World Cup finals in South Africa.<sup>142</sup>

## XXI. Spain<sup>143</sup>

Spain adopted several new regulations in response to the financial crisis.

### A. ROYAL DECREE NO. 1642/2008 OF OCTOBER 10, 2008

Under this regulation, guarantees provided by the Deposit Guarantee Fund of Credit Institutions and by the Investment Guarantee Fund, on bank deposits and investments, per depositor and investor,<sup>144</sup> have been increased from €20,000 to €100,000.

134. World Investment Report 2008 (WIR08), United Nations Conference on Trade and Development (UNCTAD), ISBN 978-92-1-112755-3, *available at* <http://www.unctad.org/Templates/webflyer.asp?docid=10502&intItemID=2068&lang=1&mode=downloads>.

135. See South African Government Notice 1246 of 2008 (Department of Trade & Industry), *available at* <http://www.info.gov.za/view/DownloadFileAction?id=90364>.

136. See Section 11 of the Competition Act (89 of 1998): Thresholds and categories of mergers, *available at* <http://www.info.gov.za/view/DownloadFileAction?id=70747>.

137. The Effects of Anti-Competitive Business Practices on Developing Countries and their Development Prospects, UNCTAD, *available at* [http://www.unctad.org/en/docs/ditclp2008/2\\_en.pdf](http://www.unctad.org/en/docs/ditclp2008/2_en.pdf).

138. See Housing Development Agency Act 23 of 2008, *available at* <http://www.info.gov.za/view/DownloadFileAction?id=89792>.

139. See *id.* at Section 4(a).

140. *New Agency to Speed up Processing of Human Settlements*, SABINET LAW, Feb. 11, 2008; *available at* [www.sabinet.co.za/sabinetlaw/news\\_par569.html](http://www.sabinet.co.za/sabinetlaw/news_par569.html)

141. See Companies Bill B61b-2008, Minister of Trade and Industry, Sept. 25, 2008, *available at* <http://www.info.gov.za/view/DownloadFileAction?id=89184>.

142. *Economic Crisis Won't Affect 2010*, THE TIMES (SOUTH AFRICA), Oct. 30, 2008.

143. This section was authored by Alessandra deMagalhaes, New York & Ferrán Escayola, Barcelona, GARRIGUES LLP, Legal Consultants.

144. Art. 1 of Royal Decree no. 1642/2008.

B. ROYAL DECREE LAW NO. 6/2008 OF OCTOBER 10, 2008, ORDER EHA/3118/2008 OF OCTOBER 31, 2008, AND DECISION OF OCTOBER 31, 2008, OF THE GENERAL DIRECTORATE OF THE TREASURY AND FINANCIAL POLICY (DIRECCIÓN GENERAL DEL TESORO Y POLÍTICA FINANCIERA)

By virtue of Royal Decree Law no. 6/2008 and implementing regulations, the Spanish government created a Fund for the Acquisition of Financial Assets, the purpose of which is to encourage financing from credit entities to companies and individuals resident in Spain by acquiring financial assets.<sup>145</sup> The Fund will invest in quality financial instruments issued by credit entities and Spanish Securitization Funds (*Fondos de Titulización*), which are supported by loans granted to individuals, companies, and non-financial entities.<sup>146</sup> The Fund will give priority to those assets supported by new loans, i.e. loans granted after October 7, 2008. The Fund will start with thirty billion euros, but may increase up to fifty billion euros.<sup>147</sup>

Order EHA/3118/2008 of October 31, 2008, which implements the Royal Decree Law, regulates the procedures for the Fund to select the assets to be purchased, which will be through public auctions. The auction call will specify, amongst other things, the maximum volume of assets that the Fund may acquire in the auction, the nature of the assets to be acquired, the characteristics of the acquisition transactions, the maximum number of bids per credit entity and the minimum and maximum value of the offers.<sup>148</sup> These auctions may only be held up until December 31, 2009.<sup>149</sup> All credit entities resident in Spain and Spanish branches of foreign credit entities that show interest may submit offers in the auctions. The offers will be considered firm commitments to sell.<sup>150</sup>

The Decision of October 31, 2008 of the General Directorate of the Treasury and Financial Policy (*Dirección General del Tesoro y Política Financiera*), determines, among other matters, the assets in which the Fund may invest.

If the investment is made through firm purchases (*compras en firme*) the eligible assets are: (i) Spanish Covered Bonds (*cédulas hipotecarias*); and (ii) Spanish Asset Securitization Bonds (*bonos de titulización de activos*) supported by *cédulas hipotecarias*, provided that they comply with certain requirements, such as having been issued as of October 15, 2008, being traded on a regulated market, having a credit rating of AAA, and a maturity date which does not exceed the term established in the auction call.

If the investment is made through sell/buyback or repo transactions (*operaciones de compraventas dobles o simultáneas*) the eligible assets are: (i) Spanish Covered Bonds (*cédulas hipotecarias*); (ii) Spanish Asset Securitization Bonds (*bonos de titulización de activos*); and (iii) Spanish Mortgage Securitization Bonds (*bonos de titulización hipotecario*). Such assets must be supported by loans granted to individuals, companies and non financial entities and comply with certain requirements, such as: having been issued as of August, 1, 2007, being traded on a regulated market, meeting conditions to be included in the list of eligible assets of the European Central Bank, having a credit rating of AA, and that the term of

145. *Id.* art. 1 of Royal Decree Law no. 6/2008.

146. *Id.* art. 4(1).

147. *Id.* art. 2(1).

148. Art. 3(1) of Order EHA/3118/2008.

149. *Id.* art. 2(2).

150. *Id.* art. 4(3).

these transactions do not exceed the term established in the auction call. The decision also provides guidelines so that the investments by the Fund are diversified.

#### C. ROYAL DECREE LAW NO. 7/2008 OF OCTOBER 10, 2008

Under Royal Decree Law no. 7/2008, the Spanish government was authorized to:

- i. Grant guarantees to credit entities resident in Spain for new financing transactions, as of October 14, 2008 to December 31, 2009.<sup>151</sup> For the year 2008, the total value of the guarantees that may be granted may reach one hundred billion euros.<sup>152</sup> The financial transactions that may merit such guarantees are primarily issuance of notes, bonds, and debentures admitted to trading on Spanish official secondary markets.
- ii. Acquire, exceptionally, and up until December 31, 2009, securities of credit entities resident in Spain, including preferred stock and interests in savings banks, thereby strengthening their capital structure.<sup>153</sup> Nonetheless, the acquisition requires a prior report issued by the Bank of Spain.<sup>154</sup>

#### XXII. Sweden<sup>155</sup>

In Sweden, the M&A activity in the first half of 2008 continued, but at a slower pace compared to the period running up to the onset of the credit crunch. Up to the second half of 2008, Sweden was close to an island of economic calm in the roiling waters around the rest of the world. Nevertheless, in the second half of 2008, Sweden was also severely hit by the credit crunch. Bad news emanating from the rest of Europe and beyond started to be felt on the OMX Nordic Exchange Stockholm (the Stockholm stock exchange) with banks looking for bailouts, deals being put on hold, and the M&A activity slowing down dramatically.

The first three quarters of 2008 saw nine introductions on the OMX being the same number as during the same period 2007. Three introductions on the OMX took place during the third quarter 2008 with a value of SEK\$140 million. The waiting list for the fourth quarter is not long and the trend is expected to be a falling number of introductions. Even though the Swedish M&A market still is active and deals are being made, the number of deals has decreased. The same applies to private equity investments.

Some other noteworthy news, activities, and trends on the Swedish M&A market during 2008 are as follows:

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151. Art 1 of Royal Decree Law no. 7/2008.

152. *Id.* art. 1(6).

153. *Id.* art. 2(1).

154. *Id.* art. 2(3).

155. This section on Sweden was authored by Per Hedman, Michael Nyman, and Malcolm Wiberg-Advokatfirman.

## A. DIVESTMENT OF STATE OWNED COMPANIES

In early spring 2007, shortly after being elected in 2006, Sweden's centre-right coalition government placed a bill in the parliament aimed at reducing state ownership and suggesting authorization for the government to sell the state's holdings in the stock market operator OMX, the Nordic and Baltic bank Nordea, the mortgage lender SBAB, the telecom operator TeliaSonera, the real estate company Vasakronan, and the distiller Vin & Sprit (including the Absolut Vodka brand). The aim was to raise around SEK\$200 billion—approximately \$25 billion—in its four-year mandate period. Last year, a portion of the holdings in TeliaSonera was divested and up to spring/summer 2008, the state has successfully sold Vin & Sprit, Vasakronan and its holdings in OMX.

1. *Vin & Sprit*

Upon deciding to sell Vin & Sprit, the government recognized that the incipient market disturbance would not hinder the deal from taking place at the right price. When the timeline for notifying interest expired on January 24, 2008, names such as Swedish Investor, EQT, US based Fortune Brands and Bermuda based Bacardi were noticed. Pernod Ricard won the bidding contest after having paid SEK\$55 billion for Vin & Sprit.

The merger was approved by the European Commission after Pernod Ricard proposed to sell some of its trademarks in order to avoid dominant market position.

2. *Vasakronan*

The property company Vasakronan AB was sold to AP Fastigheter, a Swedish property company, on September 1, 2008 for SEK\$41.1 billion. Vasakronan AB owns and manages properties in all major Swedish cities, i.e. Stockholm, the Stockholm suburbs, Gothenburg, Malmö, Lund, and Uppsala.

3. *OMX*

On August 17, 2007, Borse Dubai, through the fully owned Swedish subsidiary BD Stockholm AB, placed a public bid on all shares in OMX AB offering SEK\$265 per share, including the 6.6% of the company owned by the Swedish state. The bid was accepted on January 31, 2008.

Borse Dubai bought the shares in OMX AB with the intention of transferring them to NASDAQ and then becoming a strategic shareholder in NASDAQ. NASDAQ OMX is now the world's largest exchange operator.

## B. REMAINING STAKES

During 2008, France Telecom showed interest in TeliaSonera. Minister of Financial Markets, Mats Odell, claims that there are many prospective buyers of SBAB, but as of today no deals have been completed. However, the plans to sell the stakes in Nordea, SBAB and TeliaSonera appear to have hit the buffers following the market turmoil in the rest of Europe. The reduction of state ownership, according to the bill, shall be finished in 2010.

### C. NATIONALIZATION OF CARNEGIE

The Swedish M&A market 2008 should not be discussed without mentioning the nationalization of Carnegie, an independent Nordic investment bank and one of the investment banks engaged by the state for divestment of state-owned companies as described above.

Carnegie, already hit by a liquidity crunch, had its license revoked after a series of management failures. In November 2008, the National Debt Office stepped in as owner of Carnegie after it put in place loans to the bank, replacing assistance of up to SEK 5 billion (\$645 million) previously provided by the Central Bank to keep the company liquid. With the state behind the investment bank, financial regulators reinstated Carnegie's license.

### D. MERGER BETWEEN THE SWEDISH AND DANISH POSTAL SERVICES

In April 2008, the Swedish and Danish governments and the investor CVC Capital Partners announced that they have signed a letter of intent regarding a merger of the Swedish and Danish postal service providers to create a combined company owned by the Swedish and Danish states, CVC, and the employees. The merged company, comprised of the Swedish Posten AB and Danish Post Danmark A/S, will have over 50,000 employees and annual revenue of approximately SEK\$45 billion. The plan is to conclude the merger by the end of 2008.

### E. DISTRESSED DEALS

The number of bankruptcies increased in October 2008 by seventeen percent compared to the same month last year, and many predict that this trend will continue. Consequently, the number of distressed deals has increased and such deals are expected to continue.

The availability of financing for deals is getting worse, although some availability is still there, at least for smaller deals involving only local banks. Financing for larger deals is more difficult.

### F. NEGOTIATED DEALS ARE INCREASING

Controlled auctions with very seller friendly terms have been the normal way of selling companies in the last couple of years. But, as the market has gone from seller friendly to a buyer's market, the sellers now tend to focus on negotiated deals. Sellers put a lot more efforts into finding a buyer who is creditworthy and has a sound business case. As an effect of the economic turmoil, the terms are hardening with the buyer getting expanded warranties, increased liability caps and so forth.

In spring 2008, a number of public to private transactions took place and it was expected that the trend would continue. But, the stock market crash during the fall of 2008 has lead to stock market prices so low that is not likely that bidders can reach ninety percent, which is the threshold for a squeeze out, and the volume of public bids have thus also decreased.

## G. COMPETITION ACT OF 2008

Sweden has a new Competition Act as of November 1, 2008. One new aspect of the law is that the Competition Authority will be able to administrate fines directly without going through the court. Also new is the Competition Authority's ability to give a disqualification order for business leaders and entrepreneurs. The statute of limitation for a competition fee has been extended from five to ten years.

A company concentration shall now be reported to the Competition Authority when the total annual turnover exceeds SEK\$1 billion and at least two of the companies have an annual turnover of at least SEK\$2 million each.

A new test is introduced in Sweden to evaluate company concentration. The test is the same that is used by the European Commission: the SIEC test (Significant Impediment of Effective Competition).

XXIII. Switzerland<sup>156</sup>

## A. PUBLIC TAKEOVER TRANSACTIONS OF INTEREST

Friendly and hostile takeovers of companies listed on any Swiss stock exchange are generally governed by the Swiss Act on Stock Exchanges and Securities Trading (SESTA). The Swiss Merger Act (SMA) applies only if the acquisition is structured as a pure merger. An acquirer directly or indirectly controlling 33.3% of the target companies' voting rights must make a mandatory tender offer for all outstanding listed equity securities of a target company, if the articles of association do not foresee either the higher threshold of forty-nine percent (opting up) or no mandatory tender offer obligation (opting out). Mandatory tender offers are subject to stricter rules than voluntary tender offers. The Swiss Takeover Board (the authority ensuring the compliance of tender offers with the applicable laws) has made the following recommendations of interest in the Reporting Period:

- The Swiss Takeover Board had, in the tender offer of IAWS Group Plc via ANPHI Holding AG vs. Hiestand Holding AG, a chance to elaborate upon the differentiation of mergers falling within the scope and outside the scope of the SESTA.<sup>157</sup> It held that mergers must be treated as an atypical form of a tender offer if they are functionally similar to a tender offer. A merger is functionally equivalent to a tender offer if a minority shareholder has a factual right to choose whether to swap shares, or whether it is clear at the outset that the merger will be consummated, because controlling shareholder(s) will vote in favor of a merger. Merger transactions functionally equivalent to tender offers are governed by the provisions applicable to mandatory tender offers. In the tender offer to be decided, the acquirer was in the possession of sixty-four percent of the voting rights at the time of the merger vote.

156. This section on Switzerland was authored by Martin Liebi, Dr.iur., LL.M., attorney-at-law (New York and Switzerland), and Florian S. Jörg, Dr.iur., MCJ, attorney-at-law (New York and Switzerland), practicing in Zurich.

157. See Recommendation I of Swiss Takeover Board dated June 6, 2008, *in re LAWS Group Plc via ANPHI Holding AG*; Recommendation II of Swiss Takeover Board dated July 15, 2008, *in re LAWS Group Plc via ANPHI Holding AG*.

This made it likely that he would obtain the quorum of 66.66% of shareholder votes required for the approval of mergers under the SMA. Because of the voting rights situation, minority shareholders had no factual right to choose whether to participate in the proposed transaction, either under a tender offer scenario or under a merger scenario. The proposed merger was held to be (i) functionally equivalent to a tender offer; and (ii) subject to the mandatory tender offer provisions. The acquirer had to make a public tender offer because his voting rights exceeded the threshold of 33.3%.

- In *LAM Research Corporation vs. SEZ Holding AG*, the Swiss Takeover Board confirmed that Material Adverse Change (MAC) provisions are not to be included in mandatory tender offers. In voluntary tender offers, MAC provisions are only allowed if they refer to highly probable deteriorations of EBIT, equity or turnover of the target company. Any deterioration is considered a MAC if at least ten percent of EBIT and equity respectively five percent of turnover is affected. An independent expert such as an auditor has to examine on whether a MAC has actually occurred. The Swiss Takeover Board has also further elaborated upon its MAC-practice by holding that only highly probable occurrences, but no additional information and circumstances, can qualify as MAC.<sup>158</sup>

## B. LEGISLATIVE DEVELOPMENTS

Swiss capital markets law is in the midst of a comprehensive revision process. The SMA had entered into force in 2004, and the Capital Investment Act (CIA) in 2007. The Financial Market Supervisory Act (FMSA) is scheduled to become effective in 2009, and the revised section of the Swiss Code of Obligations (OR) regarding corporations shortly thereafter. Bearing these facts in mind, legislative developments of interest for an M&A practitioner have been relatively limited in 2008.

## C. REVISED LIMITED LIABILITY COMPANY LAW

The provisions regarding limited liability companies, which form part of the OR, have been revised completely.<sup>159</sup> The amendments introduced are numerous. In a nutshell, the new LLC received many features of the corporation without losing its partnership traits.

## D. ADDITIONAL DISCLOSURE OBLIGATIONS UNDER THE SESTA

The additional disclosure thresholds of three percent, fifteen percent, and twenty-five percent have been introduced in the SESTA. Thus, anyone, except banks and dealer/underwriters, acquiring directly, indirectly, or in concert with third parties voting rights of public companies exceeding or falling below the thresholds of three percent, five percent, ten percent, fifteen percent, twenty percent, twenty-five percent, 33.33%, fifty percent,

158. See Recommendation of Swiss Takeover Board dated Jan. 7, 2008, *LAM Research Corporation vs. SEZ Holding AG* consideration 5.3.

159. Art. 772 ss. OR.

and 66.66% must file a disclosure statement.<sup>160</sup> Derivative transactions economically allowing the acquisition of shares with a view to public takeovers are treated as indirect acquisition.<sup>161</sup> Any breach of disclosure obligations can result in suspension of voting rights for up to five years.<sup>162</sup> As of now, it remains unclear whether (i) all shares of a breaching shareholder will be subject to suspension or only those actually bought or sold in breach of the disclosure obligation; and (ii) voting right suspension will be triggered if acted negligently or willfully.

#### E. STOCK EXCHANGE ORDINANCE OF THE SWISS BANKING COMMISSION (SEOSBC)

The Swiss Banking Commission made it clear that no disclosure statement must be filed if the thresholds outlined above are only exceeded or undershot on an intraday basis,<sup>163</sup> and that according to the so-called "two pot solution," no netting between long and short positions shall be allowed. Long and short positions are reviewed independently in order to determine whether they trigger any disclosure obligations.<sup>164</sup> Disclosure of option positions must explain the terms of the option contract, such as whether they are out-of-the-money or in the money. Listed derivatives can be specified by disclosing the cusip number.<sup>165</sup>

#### F. REVISED ORDINANCE OF THE SWISS TAKEOVER BOARD

In June 2008, the Swiss Takeover Board published a first proposal regarding the planned revision of the Takeover Ordinance that became effective on January 1, 2009. The revision shall enhance the efficiency of the presently effective Takeover Ordinance by creating more transparency and by addressing its shortfalls. The revised Takeover Ordinance will widely restate the common practice implemented by the Takeover Board and the Swiss Federal Banking Commission. In addition, the following main material changes are to be introduced:

- i. The Takeover Board will directly be able to issue formal orders that can be subject to an appellate review under an administrative procedure;
- ii. The Takeover Board must publish the offering prospectus, the report of the target's board of directors, and additional information not later than ninety minutes before the opening bell;
- iii. The Takeover Board adopts the Swiss Federal Banking Commission's version of the so called "best price rule;"<sup>166</sup>
- iv. Reasonable information about the financing plans must be disclosed (but not business secrets); and

160. Art. 20 ¶ 1 SESTA.

161. *Id.* ¶ 2bis.

162. *Id.* ¶ 4bis.

163. Art. 4 ¶ 9 SEOSBC.

164. Art. 10 ¶ 3 SEOSBC.

165. Art. 17 SEOSBC.

166. The best price rules stipulates that an acquirer cannot purchase target company stock at a price exceeding the offering price during the offering period without granting the same price to all target company stockholders.



- v. The auditing board in charge of reviewing the tender offer on its legal compliance must be absolutely independent of the acquirer, the target, and all their representatives.

#### XXIV. Turkey<sup>167</sup>

Turkey's candidacy for membership in the European Union has prompted it to codify and amend some major laws and regulations, including the Commercial Code and the Code of Obligations. Both laws are among the M&A regulations expected to change in 2009.

M&A started booming in 2005 with foreign mergers and acquisitions in banking, telecommunications, and energy sectors. Since 2007, M&A activity has involved acquisitions of middle-sized corporations, especially in the retail sector. As in other countries, the volume and the number of M&A transactions in 2008 were significantly lower as compared to previous years.

According to a survey prepared by Deloitte Turkey and the *Economist* magazine, the total number of M&A's taking place in the first half of 2008 were ninety-two with a total volume of eleven billion USD. The total volume of the M&A transactions during the first half of 2007 was 10.5 billion USD and the total volume in 2007 was 21 billion USD. In the third quarter of the year, the most significant deals have been the privatization of the electric distribution companies.

Foreign investors realized seventy-five percent of the transactions in 2008. European investors formed the majority with eighty percent among all the foreign investors, but investors from Far East, India, Israel, and Russia were added to the list of foreigners realizing M&A deals in Turkey in 2008. The most significant transaction has been the privatization of TEKEL, the state owned cigarette and tobacco products manufacturing company. TEKEL was sold to British American Tobacco for US\$1.72 billion.

Most M&A deals were within the sectors of finance, food, media, retail and health. In Turkey especially the owners of well known local brands in textile and leather are willing to enter into a merger with foreigners not only to strengthen the financial position of their company and to use such a merger as a bridge to carry their local brands to foreign countries (especially in Europe).

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167. This section on Turkey was authored by Cagatay Yilmaz, LL.M., of the Yilmaz Law Offices.

